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A TREATISE
ON THE
LAW OF NEGLIGENCE.

BY
HORACE SMITH, B.A.

OF TRINITY HALL, CAMBRIDGE,
AND OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW.
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LONDON:
STEVENS AND SONS, 119, CHANCERY LANE,
Law Publishers and Booksellers.
1880.

PREFACE.

THE "Law of Negligence" has not, I think, received that amount of attention from English text writers which its importance would seem to demand.

The division of negligence into three classes, viz. : Neglect of duties requiring (1) ordinary, (2) more than ordinary, and (3) less than ordinary care appeared, upon the whole, to be a reasonable plan. This division is, no doubt, somewhat arbitrary ; but it has the advantage of proceeding in some measure *super antiquas vias*, and it adapts itself to the increasing complexity of modern obligations. It cannot be doubted that in the progress of civilization a constantly increasing amount of care is required of men in proportion to the increased skill and intelligence which they are found to possess, to the increased difficulties of the duties which they undertake to perform, and to the keener sense of responsibility towards others which is characteristic of a more refined age. Thus it will be found, I think, that there is a tendency both in the recent judgments of the judges and in the enactments of the Legislature to widen the responsibilities of men in their conduct towards others.

Upon the whole, then, I have thought such a division of my work to be desirable as giving a clearer view of what care the law requires in the performance of duties generally. These divisions I have subdivided into different sections, each section dealing with a particular class of circumstances : as, for instance, "Duties of Owners of Property," "of Owners of Animals," "of Controllers of Highways," "of Physicians," "of Solicitors," &c., &c. ; for I cannot doubt that for convenience of reference such subdivisions are extremely useful, and I have aimed, as far as possible, at rendering my work a practical treatise upon the law for the use of the profession.

With regard to the manner in which the cases from the various reports have been dealt with, I have found it impossible within the proposed limits of this volume to discuss the judgments at any great length. I have endeavoured to state what I believe to be the result of a number of cases in the text, and in the note have given the names of the cases ; generally indicating, in a few words in a bracket, what the principal fact was, so as to assist the memory of the reader and to enable the practitioner to find those cases which are most similar to the one which he has in hand ; and sometimes I have offered some suggestion towards a just appreciation of the decision.

The subject of negligence with respect to the management of ships has, I feel, been inadequately treated. Questions of negligence, causing the loss of goods or of the vessels themselves, are invariably complicated by the special contracts entered into, such as bills of lading, charter-parties, or insurances, regulations of navigation, the laws and customs of Maritime Courts, and other matters. The cases are numerous and intricate, and I have felt that my book would be overbalanced by a full discussion of the Law of Negligence as applied to shipping ; but that some account of the subject ought to be given in order to render the work as complete as possible. I am indebted to Mr. Aspinall, of the Common Law Bar, for having kindly looked over this section, and given me the benefit of some suggestions, although I alone am responsible for any errors which may appear.

I have availed myself of the learning and philosophic reasoning of Wharton, the lucid exposition of Shearman and Redfield, and the suggestive ingenuity of Campbell. I cannot hope that I have succeeded in combining all their merits, and I am sensible that my work may have serious defects of its own ; but after the care and labour I have bestowed I cannot help believing that I have produced a useful book.

HORACE SMITH.

4, PAPER BUILDINGS, TEMPLE,
May, 1880.

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ADDENDA ET CORRIGENDA.

- Page 3, line 16.—To “pp. 19, 20,” add pp. “17, 18.”
- „ 23, note (l).—Add to “s. 2,” “p. 30,” and to “Ch. II., s. 2,” add “p. 81.”
- „ 23, „ (p).—Add to “s. 2,” “pp. 30, 31.”
- „ 29, line 5.—For “s. 4” read “s. 2, sub-s. 1,” and for “s. 7” read “s. 8.”
- „ 30, „ 11.—After the words “in the premises” insert “it has been held that.”
- „ 43, „ 14.—For “animal” read “animals.”
- „ 79, „ 7 from bottom.—For “there” read “their.”
- „ 103, „ 6 from bottom.—For “was intended to” read “should.”
- „ 107, note (p).—For “London & York Ry.” read “Lanc. & York. Ry.”
- „ 114, „ (d).—“The decision in *Foulkes v. Met. Ry. Co.* was affirmed in the Court of Appeal, March 18, 1880. See 28 Weekly Reporter 526. Bramwell, L.J., said there was a breach of ‘that duty which the law imposes upon all, viz.: to do no act to injure another;’ and Baggallay and Thessiger, L.L.J., emphatically rest their judgment upon a breach of duty and not of contract.”
- „ 117, „ (h), line 8.—For “41 L. J. Q. B. 89” read “42 L. J. Ex. 89,” and add to note: “See *Foulkes v. Met. Ry. Co.*, *supra*. Baggallay, L.J., said: ‘In respect of that portion of the line over which they had running powers they had the same duties and were under the same obligations relating to their passengers as they had or were under in respect of the portion of line which was their own.’”
- „ 136, line 6 from bottom.—For “them” read “him,” and for “their” read “his.”
- „ 160, „ 3.—After the word “gates” insert “and.”
- „ 164, note (d).—Delete “or Smith.”
- „ 171, „ (n).—Add: “see *Phillips v. L. & S. W. Ry.*, L. R. 5 Q. B. D. 78; 49 L. J. Q. B. C. A. 233.”

THE LAW OF NEGLIGENCE.

CHAPTER I.

DEFINITION AND DIVISION OF SUBJECT.

NEGLIGENCE (1) in law is a breach of duty (2) unintentional (3) and proximately (4) producing injury (5) to another possessing equal rights (6). We will first proceed to explain the terms of the above definition in the order in which they stand in the sentence.

- (1) The term "negligence" perhaps more accurately describes a state of mind, or an absence of prudence and forethought; but the law does not deal with a man's state of mind, but with the acts which flow from it, and we are only proposing to treat of that which is negligence in law.
- (2) We are speaking here of legal duties, and breaches of which the law takes cognizance. The law considers injurious acts to be in general "culpable" which are such as a reasonably careful man would foresee might be productive of injury, and which he would abstain from doing (*a*). We will consider presently more at length how duties may arise, and what amount of care is required in the performance of them, but at present it is only necessary to state that a duty must be shown to have been broken. The plaintiff must show what

(*a*) *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781.

the duty was, and how it was broken. It is not sufficient that a careless act has been done by the defendant by which the plaintiff has sustained loss (*b*). The liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done (*c*). It cannot be predicated of any particular act that it is *per se* negligent; it is only so because it is a breach of duty, so that an act done by one man may be negligent which, done by another, would not be so, because he had no duty with respect to it. Sometimes the duty may have arisen out of a contract between the parties; but it is not necessary that it should have so arisen. It may arise out of the relative situation of the parties, or be imposed by statute, as we shall shortly see (*d*).

- (3) If the act be intentional it becomes fraudulent or criminal, or it may be a trespass, and it is not proposed to deal with such questions in the present treatise (*e*).
- (4) We will defer for the present the consideration at length of the word "proximately" (*f*), as the subject is one of considerable difficulty, and the cases which illustrate it are numerous. It is sufficient here to explain the meaning of the word in our definition by saying that in order to make a person liable for a culpable breach of duty producing injury to another, it must be shown that the damage was the ordinary and probable consequence of such breach, or, in other words, that the negligent act was the "proximate" cause of the damage.
- (5) An "injury" must be produced by the negligent act—

(*b*) See *Daniel v. Met. Ry. Co.*, L. R. 5 E. & I. App. 45; 40 L. J. C. P. 121; *per Willes, J.*, in *Gautret v. Egerton*, L. R. 2 C. P. 374; 36 L. J. C. P. 191; *per Byles, J.*, in *Collis v. Selden*, L. R. 3 C. P. 498; 37 L. J. C. P. 233; *Bulman v. Furness Ry. Co.*, 32 L. T. N. S. 420.

(*c*) *Per Blackburn, J.*, *Mersey Docks v. Gibbs*, L. R. 1 H. L. p. 115; 35 L. J. Ex. 225.

(*d*) *Collett v. L. & N. W. Ry. Co.* 16 Q. B. 984.

(*e*) See "Wharton on Negligence," s. 132.

(*f*) See *post*, p. 13.

that is to say, there must be something more than mere damage done, something injurious to the rights of another, and this is involved in the "breach of duty," for the breach of a legal duty is the invasion of the corresponding right.

- (6) The next few words of our definition require some attention, and I am not aware that the proposition contained in them can be supported by any distinct authority, but it appears to me to be correct. In *Deane v. Clayton*, 7 Taunt. 489, Burrough, J., at p. 499, says—"I conceive that every person is protected by this rule (*sic utere tuo*) who has a right equal to that of him who does the act, and who is injured, without his default, in the exercise of that right." In the last edition of "Addison on Torts," by Mr. Cave, Q.C. (pp. 19, 20), it is said that the person injured must be in the exercise of an available right. Now, if the law regarded the right as inferior, it could not avail, and if it regarded the right as superior, no negligence need be alleged. The plaintiff's right must be of that sort which he is able to oppose to the right which is being exercised by the defendant, and make available against him by saying—"It is true you are lawfully exercising your right, but I am in the exercise of a right which I am able to oppose to yours, and you must therefore exercise care towards me" (g). Our proposition is that the question of negligence only arises where the rights of the parties are equal; or, in other words, where the rights are unequal the question of negligence does not arise. If a man has no right to do an act, or his right to do such act is subordinated to the right of another (which is the same thing, for then relatively he has no right), he is liable to an action for injury caused by the commission of the act, whether

(g) See also *per Byles, J.*, in *Collis v. Selden*, *supra*.

carelessly done or not ; but such action would be in the nature of "trespass," and not of "negligence." But where the rights are equal, and one party in the very exercise of his undisputed right acts carelessly, and so injures the rights of another, the action of negligence arises. The question, when are the rights equal, and when subordinated, can only be answered by saying, when the law thinks it expedient that it should be so. Thus, in the case of two persons driving along a highway, the rights are equal ; and, if one or other neglects his duty and so injures the other's right, an action of negligence arises. On the other hand, if a man digs a hole in my land, or if, in digging a hole near the boundary, he lets down my lands, it is a *tort* ; and further, if an adjoining owner digs a hole near to my ancient house, the law subordinates his right to dig the hole to my right to possess my house in safety, and the action is a simple action of *tort*, and requires no allegation of negligence to support it. The reason why the law subordinates his right to mine is because it is expedient to do so. But if an adjoining owner digs a hole near to my *modern* house, I have no dominant right, nor has he (see this discussed *post*, Ch. II., s. 2, tit. Owners of Property) ; but my right to have my house undisturbed by him is equal to his right to dig in the boundary, and the question of negligence or no negligence in such digging immediately arises. Each party has to use due care—the landowner that he digs carefully, and the householder that he builds carefully. If a man built a house close to his boundary so negligently that the soil of the adjoining owner, exercising all possible care, was injured, I conclude such adjoining owner might have an action for negligence against the householder (*h*).

(*h*) *Dodd v. Holme*, 1 A. & E. 493. owner's land there would also arise a
If the house fell on the adjoining right of action for trespass.

Having now shortly explained the meaning of our definition, which it may not be inconvenient to repeat at this place—"Negligence in law is a breach of duty unintentional and proximately producing injury to another possessing equal rights"—we will proceed to describe the way in which duties arise, and what amount of care is required in their performance, and what is the nature of a breach of duty which the law takes cognizance of, viz., a culpable act contrary to the duty and *proximately* producing injury.

Duties may arise out of express contracts between parties, or may be imposed by law.

It is not proposed in the present treatise to deal with the breaches of those duties which are expressly or impliedly provided for by the nature or terms of the contract, partly because the field so opened out would be too extensive, and partly because the term "negligence" is not strictly speaking applicable to such breaches of duty, the question in such cases being, not whether the act done or omitted is negligent or not, but whether the act done or omitted is what was or was not expressly or impliedly agreed to be done or omitted. It will, however, be found that cases of breach of contract are frequently referred to in the text; for it very often happens that the contract between the parties is little more than an expression in words of what the law would otherwise impose, and the question raised between the parties is the same as if there had been a breach of a duty imposed by law. Where persons have imposed entirely new duties upon themselves by agreement, or have limited or varied by agreement the obligations imposed upon them by law, this treatise will not deal with the question of their liability.

Sometimes, however, where there has been a breach of contract towards the contracting party there has also been a breach of duty towards a third person not privy to the contract, and such breach of such duty is actionable. Thus, where a man sold a gun which he knew to be dangerous to the father of a lad, knowing the lad would use

it (*i*), and where a man sold a pernicious hair dye to another man, knowing his wife would use it (*j*), the defendants in each case were held liable for the injuries done to such third parties on the ground that knowing who was going to use the articles they owed to such third parties a duty to use care towards them. But where a man negligently built a coach (*k*), and negligently put up a chandelier (*l*), it was held that he owed no duty to a stranger and was not liable to a stranger who was injured in consequence of such negligence. In an American case (*m*) it was held that where the negligence was dangerous to human life, as in the case of poisonous drugs, the negligent person was liable to any one, however remote, who was injured. The true question always is, has the defendant committed a breach of duty, apart from contract? If he has only committed a breach of contract he is liable to those only with whom he has contracted; but if he has committed a breach of duty he is not protected by setting up a contract in respect of the same matter with another person (*n*).

The present treatise, therefore, is limited as far as possible to the breach of duties imposed by law. These duties may be such as the law imposes or infers from the possession of rights or from the relations of life, such as "employer and employed," or such as the law specifically imposes by statute. They divide themselves, therefore, into three heads, (1) duties which arise out of rights, (2) duties which arise out of employment, (3) duties imposed by statutes.

(1) Men are put by the law in possession of rights, and the law imposes upon all men in the exercise of any right a duty not to interfere with the equal rights of another apart

(*i*) *Levy v. Langridge*, 4 M. & W. 337. This case turned on the question of fraud.

(*j*) *George v. Skivington*, L. R. 1 Exch. 1.

(*k*) *Winterbottom v. Wright*, 10 M. & W. 109.

(*l*) *Collis v. Selden*, L. R. 3 C. P.

495; 37 L. J. C. P. 223.

(*m*) *Thomas v. Winchester*, 6 N. Y. 397; and see *Parry v. Smith*, 48 L. J. C. P. 731 L. R.

(*n*) See *Austin v. Gt. Western Ry. Co.*, *per* Blackburn, J., L. R. 2 Q. B. 442; 86 L. J. Q. B. 201.

from any agreements which they may have made between themselves.

If in the exercise of a right which a man has by law, he unintentionally breaks or omits the duty of not interfering with the equal rights of another which is imposed by law and thereby injures another, he is guilty of a tort called negligence.

(2) So, also, where two persons assume relations towards each other of employer and employed involving the performance of services, there the law implies or imposes the conditions that the performance must be carefully carried out.

(3) And, lastly, where a statute directs a person to perform a duty and he omits to perform that duty with care, he is guilty of negligence.

But although duties may be said to arise in these three separate ways, yet it will be found that the origin of the duty does not materially affect the question of liability for negligence in the breach of the duty, which is the subject of this treatise. It may be remarked that in general duties imposed by statute are to be more strictly observed than those which are not so imposed (*o*) ; but I think that in most of the cases it will be found that the statutory duty is imposed when a benefit is also bestowed, and it is in consideration of the benefit so bestowed that something more than ordinary care is expected in the execution of the duty (*p*).

But the law draws a very important and practical distinction between ordinary negligence and negligence where the law demands greater or less care. The law demands greater care where a person has or professes to have greater skill, or where an extra amount of duty has been undertaken, or advantage obtained, or where the law deems it for the public good to require a greater amount of care; and the law

(*o*) See Campbell, p. 35, 2nd ed.

(*p*) See *post*, Ch. III., s. 7, Corpo-

rations performing statutory duties.

demands a less amount of care where a less amount has been undertaken, or where no advantage has been obtained.

There is in law a well known relationship, viz., that of insurer and assured, by which one person engages to indemnify or to assure another against loss. This is usually effected by express contract, but is sometimes implied by the law, as, for instance, in the case of common carriers, who become a sort of insurers of goods entrusted to them for carriage, and are bound to carry safely, and are answerable for loss without any proof of negligence. With regard to such contracts, express or implied, no question of negligence arises; and the same holds with respect to cases which may be said to be in the nature of assurance, viz., where a person brings upon his land some dangerous thing, such as fire or water, or a dangerous animal, for he is bound, as we shall see, to keep it at home at his peril. In all these classes of cases something more than "care," however diligent, is demanded, viz., absolute indemnity.

But between these classes and those duties which require the exercise of ordinary care there appear to be a great number of cases in which the law requires something more than ordinary care, and something less than insurance. There is also a further class where less than ordinary care is required, and yet the law will see that a man is not absolutely careless of the rights of another. This mode of dividing the duties regarded by the law as obligatory, and which is adopted more or less distinctly in the language of English judges, is derived from the Roman law.

It is said that certain duties are of a more exigent kind than others, and that a neglect of them is less excusable, not because they require greater skill in the execution, but that from other circumstances they ought to be more strictly performed.

The Romans divided duties into three classes, (1) for the benefit of the performer, (2) for the benefit of both parties, (3) for the benefit of the performee. Thus, (1) where the

transaction in respect of which the duty arose was for the benefit of the person performing it, it was considered that, as it was to be done for his advantage alone, and he was to derive benefit from another, he ought to take the greatest care not to injure that other; and he was therefore held liable for *culpa levis*, or slight neglect, and would come within our second division. (2) Where the transaction out of which the duty arose was for the benefit of both parties, it was considered that the person performing the duty should take ordinary and reasonable care; and he was therefore held liable for *culpa*, and would come within our first division. (3) Lastly, where the transaction out of which the duty arose was for the sole benefit of another, and the person performing it would derive no benefit from it, it was considered that the person performing it was not bound to exercise much care; and he was therefore held not liable, except for *culpa lata* (q), and this will come within our third division.

Different writers have divided these sorts of negligence in different manners, some insisting that there are only two sorts of negligence—"culpa levis" and "*culpa lata*;" others dividing the subject into three sorts—"culpa lata," *culpa* (including *culpa levis*), and *culpa levissima* (r); but it seems upon the whole in the English Courts (s) and in the American Courts (t) that there are three sorts of negligence, and it has been frequently held that sometimes persons are liable for *slight* negligence, sometimes for *ordinary* negligence, and sometimes for *gross* negligence; and it will be found impossible not to

(q) But in case of *mandate*, even where for the benefit of another, he was by the Roman law liable for *culpa* merely, or even, perhaps, for *culpa levis*; for, said the Roman law, he has undertaken a gratuitous service and must perform it. Campbell, s. 11; Wharton, s. 493, and, as pointed out by Mr. Wharton, s. 500, the gratuitous mandatory must, according to our law, bring that amount of skill to the

execution of his services which he has undertaken to show. And see *post*, Ch. III.

(r) See Campbell, p. 4.

(s) See Campbell, s. 14. (He divides obligations into four classes, but one of them is "absolute assurance," which is really outside of the subject). Shearman, Ch. II., s. 16.

(t) See this view discussed by Wharton, s. 57.

adhere to these terms, which were in the Roman law really co-ordinate to the distinctly different kind of duty which was to be performed, and which will be found constantly used in the English cases. The practical difficulty, however, is very great in any particular case of saying whether the negligence is slight, ordinary, or gross. This is a question of fact (*u*), and will be constantly varying according to times, places, and circumstances.

The first question to be considered, therefore, is, when an injurious act has been done, which of the three sorts of duty had the man to perform, viz., more than ordinary care, ordinary care, or less than ordinary care, and according as it is found to be of the first, second, or third class, so is he liable for slight, ordinary, or gross negligence; and the sort of duty demanded of him depends upon the question for whose benefit was he doing the duty. As an illustration, take the following case:—My goods are lost. The person who lost them was (1) dealing with them for his own advantage alone, (2) for our mutual advantage, (3) for my advantage alone. His duty is (1) to take more than ordinary care, (2) to take ordinary care,

(*u*) In an action of negligence, as in other actions, it is for the judge to say whether there is any evidence of negligence at all to go to the jury, and if not, to direct a nonsuit, *Daniel v. Met. Ry. Co.*, *ante*, p. 2; and it is now well settled in England that a mere scintilla of evidence is not sufficient to go to the jury, *Gee v. Met. Ry. Co.*, L. R. 8 Q. B. 161; 42 L. J. Q. B. 105; *Met. Ry. Co. v. Jackson*, 47 L. J. H. L. 303; L. R. 3 App. Cas. 193; though in America it would seem that the question of negligence is always a question for the jury, *Shearman*, 13. Upon any given state of facts it is for the judge to say whether negligence can legitimately be inferred, and the jury whether it *ought* to be inferred, *Met. Ry. Co. v. Jackson*, *supra*. Where, on the other hand, there is conflicting evidence on a question of fact, the judge, whatever may be his opinion as

to the value of the evidence, must leave it to the jury, *D. W. & W. Ry. Co. v. Slattery*, L. R. 3 App. Cas. 1155. The duty of the judge is to declare negatively that there is no evidence to go to the jury, but not affirmatively that a certain issue is proved, *per Lord Penzance*, *ib.* at p. 1181. The judges have sometimes been very astute to discover that there is no evidence to go to the jury when it would seem there is some apprehension of prejudice, see the case of *Ellis v. Gt. W. Ry. Co.*, L. R. 9 C. P. 551; 43 L. J. C. P. 304, where four learned judges thought there was nothing for the jury where the plaintiff swore that he heard no whistle, and heard no porter call out, because the fact of his not hearing was only negative evidence; two judges dissented, and the judge at the trial had directed the jury that there was evidence.

(3) to take less than ordinary care. He is liable (1) for slight, (2) for ordinary, (3) for gross negligence. The jury having found as a fact that the defendant was dealing with the goods for his own advantage, or for the mutual advantage of both parties, or for my advantage alone, the law says for what sort of negligence he is liable. The next question is a matter of fact for the jury. As a matter of fact, he left them for two minutes outside an inn on the road. Now comes the question, is that an act of slight, ordinary, or gross negligence? The jury would then have to consider the questions of fact apart from the persons; as, for instance, were the goods of a class likely to be lost or stolen? was the cart properly covered? was the inn in a populous place? and so on.

As we have said before (v), an injurious act cannot of itself be said to be negligent or not, but only with reference to a breach of duty, and the question is, what is the duty? what kind of care was demanded? and what kind of care was in fact exercised?

The truth is that the words "gross," "ordinary," and "slight" (x), however useful in the simpler classification of the Roman law, and used with the more exact precision of the Latin language, have become vague and misleading in the English cases and text-books, and, indeed, are sometimes used merely to express strong feeling with respect to the particular action being tried. It is submitted that the best test of whether an act is culpably negligent in the particular case is to inquire whether there was a duty to exercise ordinary care, or something more or less than ordinary care, incumbent upon the party, and whether he had reasonably fulfilled that duty;

(v) See *ante*, p. 2.

(x) It may be noticed that the word "slight" is not exactly "*levis*," which is "light," and that the word "gross" is not exactly "*lata*," and that in each instance the English word is too strong, and, in fact, as is usual in English, more vigorous and pictur-

esque than accurate. The word "gross" seems to approach the Latin "*dolus*," which denotes intentional wrong, and is outside of our subject; and the word "slight" approaches to that "*culpa levissima*" which is sometimes spoken of negligence, but amounts to "*casus*," or accident.

if he has, he is not negligent ; if he has not, he is negligent. The words "ordinary" and "reasonably" are no doubt vague, but the subject is only further obscured by the introduction of the words "gross" and "slight," because nobody can really say what they mean, though anybody may easily give to them some peculiar or exaggerated meaning (y).

The subject will, therefore, be divided in the next three chapters into—

1. Neglect of duties requiring ordinary care.
2. Neglect of duties requiring skill, or an extraordinary amount of care.
3. Neglect of duties requiring less than ordinary care.

These chapters are divided into sections ; the first section of the first chapter dealing with ordinary duties of people in general, or ordinary people, while in the other sections certain classes of persons have for convenience sake been taken separately. The principles of law which govern them all are the same, but when it has to be decided as a matter of practice whether a particular act is negligent or not, it is useful (though unscientific) to refer to cases where the facts have been of a similar description. For instance, the law says that a man should take such care as a reasonably careful man would take, whether he is riding along a road, or whether he is selecting workmen to perform some work ; but to say that it has been held negligence to spur a horse in a crowd would throw no light upon the hiring of workmen, though it might do so upon the question whether whipping a horse in a crowd would be negligence.

Before passing, however, from the definition of our subject, it is necessary to explain at somewhat greater length than we have already done (z) what we mean by the term "*proximately* producing injury."

In order to render a person liable for damage flowing from

(y) See judgment of Lord Chelmsford in *Gibbin v. McMullen*, L. R. 2 P. C. 317.
 (z) *Ante*, p. 2.

his negligence, it must be shown that the damage was the ordinary or probable consequence of the act (*a*). What is or is not a probable consequence of a particular act is of course not a matter of law, but of common sense.

In this part of our definition of negligence the word "proximately" must be distinguished from the word "culpable." An act to be culpable, that is, to be a breach of legal duty, must, as we have seen, *ante*, p. 1, be such as a reasonably careful man would foresee might be productive of injury; and a person is not liable for an injury which he could not foresee (*b*). But a breach of duty to be "proximately" producing injury must be such that, whether the defendant could foresee the injury to be probable or not, the breach of duty is in fact the probable cause of the injury (*c*).

Cases involving the doctrine of contributory negligence are reserved for another chapter (*d*), for although the question is substantially in those cases the same—viz., whether the act of the defendant is remote from the damage or not—yet the intervention of the plaintiff produces some degree of complication, and it has been thought better to devote a separate chapter to the subject. The cases we are now considering are those where a negligent act has been done by the defendant, but such act is separated from the injury done to the plaintiff either by the intervention of third parties (*e*),

(*a*) *Scott v. Shepherd*, 1 Sm. L. C. 417 (a squib thrown from one to another); *Sharp v. Powell*, L. R. 7 C. P. 259; 41 L. J. C. P. 95. This doctrine is part of the well-known legal maxim, "*In jure non remota causa sed proxima spectatur*," the most frequent illustration of which is to be found in cases of marine insurance, where the question of what was the immediate cause of the loss becomes material. The cases upon this subject may be conveniently studied in Broom's *Legal Maxims*, Mayne on *Damages*, 3rd ed., p. 39.

(*b*) *Blyth v. Birmingham Waterworks*, *ante*, p. 1.

(*c*) *Pearson v. Cox*, L. R. 2 C. P. D. 369. See also *Nichols v. Marsland*, L. R. 2 Ex. Div. 1; 46 L. J. Ex. 174 (effects of an extraordinary rainfall might have been prevented, but could not have been reasonably anticipated).

(*d*) See *post*, Ch. V.

(*e*) *Burrows v. March Gas Co.*, L. R. 5 Ex. 67; 7 Ex. 96; 41 L. J. Ex. 46 (gas company laid defective pipe; gasfitter went there with lighted candle); *Hill v. New River Co.*, 9 B. & S. 303 (defendants threw up jet of water near to pit dug by contractors, into which horse fell); *Collins v. Mid. Level Commissioners*, L. R. 4 C. P. 279 (defendants negligently con-

or the forces of nature (*f*), or distance of time (*g*) or space (*h*).

Where the intervention of third parties takes place, it will be found stated in some text-books that such intervention is no defence in any case, but it is apprehended that this is not the ground of the decisions cited in the note; but the real ground of those decisions is that the defendants' acts were the "proximate cause of the injury," but if the acts of such third parties are the proximate cause of the injury the defendants would not be liable (*i*).

Where the intervention is by the forces of nature, it should be observed that, where there is what is called an act of God, or an inevitable accident, the defendants will not be liable. In such cases there is not only such an intervention as may make the acts of the defendant *remotely* connected with the damage, but also such as render the acts of the defendant positively and entirely unconnected (*k*).

structed sluices; plaintiff dammed them up; third parties opened the dam); *Harrison v. Gt. N. Ry. Co.*, 3 H. & C. 231 (defendants made insufficient delph; commissioners did not cleanse river below; water penned back, and delph burst); *Jackson v. Met. Ry. Co.*, *ante*, p. 10 (defendants negligently permitted crowd to get into carriage; plaintiff's thumb injured at the next station).

(*f*) *Smith v. L. & S. W. Ry. Co.*, L. R. 5 C. P. 98; 6 C. P. 14; 40 L. J. C. P. 21, Ex. Ch. (cut grass on railway bank; wind blowing fire to cottage at a great distance); *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Ex. 208 (ship drifted by waves against plaintiff's sea wall); *Sharp v. Powell*, *ante*, p. 13 (water from washing van frozen into ice, upon which horse slipped); *Sneesby v. L. & Y. Ry. Co.*, L. R. 1 Q. B. D. 42; 45 L. J. Q. B. 1, C. A. (trucks sent down line so as to frighten cattle); *Harris v. Mobbs*, L. R. 3 Ex. D. 268 (van left at night by side of road frightened plaintiff's horse); *Hobbs v. L. & S. W. Ry. Co.*, L. R. 10 Q. B.

111 (plaintiff and wife taken to wrong station; held defendant liable for delay, but not for cold caught by wife); *Workman v. G. N. Ry. Co.*, 32 L. J. Q. B. 279 (land flooded to a greater extent than would have been); *Walker v. Goe*, 4 H. & N. 350; 28 L. J. Ex. 184 (lock fell in from want of repair, not from want of notice by commissioners). Of this class also are those cases where cattle are injured by something done by them in consequence of defendant's negligence in not repairing fences, &c.: see *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; 42 L. J. Q. B. 147 (eating yew leaves); *Firth v. Bowling Iron Company*, L. R. 3 C. P. D. 254; 47 L. J. C. P. 358 (eating iron filings); and see these cases *post*, Ch. II., s. 1.

(*g*) *Jackson v. Met. Ry. Co.*, *ante*, p. 10.

(*h*) *Smith v. L. & S. W. Ry. Co.*, *supra*.

(*i*) See this question discussed *post*, Ch. V., Contributory Negligence.

(*k*) *G. W. Ry. of Canada v. Fawcett*, 1 Moo. P. C. N. S. 101 (storm of unusual violence breaking down railway line).

The act of God is no defence except where the defendant shows that he himself has performed his duty (*l*). If the defendant can show that he has provided for every probable contingency he is not liable further, but may excuse himself for not providing for something which is contrary to all previous experience (*m*).

A curious case, where the injury was held not to be too remotely connected with the breach of duty, was the following: A young child, of four and a half years, was found with its foot cut off, shortly after leaving home, on the railway, close to where a footpath crossed the line. There was no gate, although it was the defendant's statutable duty to place one across the path. Had the gate been there the child *might* have turned back and not gone on the line, so that the omission to put the gate *might* be the cause of the child going there. It was not suggested that there was any contributory negligence. It was held that the child being found injured upon the line was sufficiently connected with the breach of duty in not putting up a gate to render defendant liable (*n*).

It may be that the negligent act of the defendant would *probably* by itself, and unassisted, have produced the injury, but that, in point of fact, the defendant's act has received assistance towards producing the injury, or has set in motion other causes tending to produce the injury. In such cases the defendant will be liable. And even if the defendant's act could not have done the injury, except it had received such assistance, or set in motion some other cause, yet it is appre-

(*l*) See *per* Fry, J., in *Nitro-Phosphate Co. v. L. & St. K. Docks*, L. R. 9 Ch. D. 513; *City of Philadelphia v. Gilmartin*, 71 Pa. St. 140, *per* Agnew, J.; *Keighley's Case*, 10 Rep. 130 a; see *Withers v. North Kent Ry. Co.*, 27 L. J. Ex. 417; and see numerous cases as to carriers—see "*Brown on Carriers*," and see *post*, Ch. III., s. 8.
(*m*) *Smith v. Musgrave*, S. C.; *Flet-*

cher v. Smith, L. R. 3 Q. B. D. 389; 47 L. J. Q. B. 451; *Blyth v. Birmingham Waterworks*, 11 Ex. 781.

(*n*) *Williams v. G. W. Ry. Co.*, L. R. 9 Ex. 157; 43 L. J. Ex. 105. In *Singleton v. East. C. Ry. Co.*, 7 C. B. N. S. 287, it did not appear that defendants had neglected any duty, and there was nothing to show how the child got on the line.

hended the defendant would in many cases be held liable, although it is impossible to say in what cases he would be so held. If defendant's act were very much the most efficient cause he would be liable; if some other cause were very much the most efficient he would not be liable; but where the defendant's act and some other cause contribute with some degree of equality towards the production of the injury, it would be, as a matter of fact, a great difficulty to decide whether the defendant is liable. Possibly it may be said that if the defendant's act contributed in a material degree he is liable.

For instance, if the defendant leaves a cart unattended in the street, and a person passing strikes the horse, which runs over the plaintiff, the defendant would be liable, although the act of a third person was one immediate cause of the injury; for the leaving the cart unattended was a negligent act, the probable consequence of which would be that the horse might start (o). The defendant's negligent act is, therefore, the proximate cause of the horse starting. In a recent case of *Clark v. Chambers* (p), it was held, that, the act of the defendant being the *primary* cause of the injury, it was immaterial that the act of a stranger was the *immediate* cause. It is not quite clear what meaning is intended to be attached to the word *primary*; but from the whole of the judgment it appears that the same doctrine as that stated above is intended to be laid down, viz., that when a negligent act is done which will probably lead to injury, and which does lead to it, it is immaterial through what probable steps it passes. It should, however, be observed that *Clark v. Chambers* was one of those cases in which the defendant is dealing with a dangerous thing, of which he is bound to take especial care; but in truth that is the very reason why his not taking care is

(o) See *Lynch v. Nurdin*, 5 Q. B. 29, where a child got into a cart standing at a door unwatched; and *Illidge v. Goodwin*, 5 C. & P. 192, where a passer-by struck a horse

(p) *Clark v. Chambers*, L. R. 3 Q. B. D. 327; 47 L. J. 439 (defendant put spikes upon a barrier across roadway, and a stranger moved the barrier on to the footpath).

held to be the chief cause of the mischief. If I let a good-tempered dog loose in the street, and a stranger strikes him and is bitten, the bite is not a probable consequence of my act; but if the dog were bad-tempered, the bite would be the probable consequence (*q*).

There is also a class of cases where it has been sought to recover damages from the defendant who has by his acts neglected a duty which he owed to a third party, or committed a breach of contract with a third party, and the effect of such neglect of duty or breach of contract has been to injure the plaintiff, and it has been held that the act is too remotely connected with the injury (*r*); but if he owes a duty towards the plaintiff (although his contract may be with a third party), he is then brought, as it were, into connection with the plaintiff, and his act is not too remotely connected with the injury (*s*).

It is no defence that the injury which has, in fact, happened, is by reason of other circumstances greater in degree than would probably happen (*t*). For instance, if a man negligently sets fire to his own house it is not probable that he will burn down the whole street, yet he will be liable for the injury done to the house at the far end of it; but if a lighted stick flew into an adjoining street and there frightened the plaintiff's horse, he would not be liable for the consequent injury as being too remote. Where, however, the injury done by the negligence of the defendant is separable from that arising from another cause, so that it can be fairly seen how much of the injury is due to the defendant's negligence and

(*q*) *Mangan v. Atterton*, 4 H. & C. 388 (machine left open in market-place, played with by boy, is practically overruled by the above case).

(*r*) *Cattle v. Stockton Waterworks Co.*, L. R. 10 Q. B. 453; 44 L. J. Q. B. 139. (The defendants negligently laid a pipe so that water leaked out upon K.'s land. K. employed plaintiff to dig a cutting through the land at a price. In consequence of the wet

plaintiff could not make a profit. Held, that whether K. could sue or not for himself, or as trustee for plaintiff, plaintiff could not sue.)

(*s*) *Levy v. Langridge*, 4 M. & W. 337; *Lumley v. Gye*, 2 E. & B. 216. See these cases *ante*, Ch. I., p. 5.

(*t*) See *Smith v. L. & S. W. Ry. Co.* in Exch. Ch., *supra*. See also *post*, "Contributory Negligence," Ch. V.

how much to another cause, the damages may be apportioned (*u*).

It is no defence where an injury is done in consequence of a breach of duty by the defendant to say that the same injury would have happened by reason of some other cause if the defendant had not neglected his duty (*x*), if after all it was the defendant's act which caused the injury.

Having now, as it is hoped, rendered clear our definition of negligence, we proceed to consider the three divisions of our subject :

1. Neglect of duties requiring ordinary care.
2. Neglect of duties requiring skill, or an extraordinary amount of care.
3. Neglect of duties requiring less than ordinary care.

(*u*) *Workman v. G. N. Ry. Co.*, 32 L. J. Q. B. 279 (plaintiff's land would have been flooded to a certain extent, but was so to a greater extent by defendant's embankment); *Nitro-Phosphate Co. v. L. & St. K. Docks*,

L. R. 9 Ch. D. 503 (effect of defendant's embankment increased by act of God).

(*x*) *Nitro-Phosphate Co. v. St. K. Docks*, *supra*.

CHAPTER II.

NEGLECT OF DUTIES REQUIRING ORDINARY CARE.

SECTION I.

Neglect of Duties Requiring Ordinary Care.

By the expression "duties requiring ordinary care" is meant those duties devolving upon persons who do not hold themselves out as having, nor is there demanded of them, any peculiar or extraordinary care or skill. Different persons have, of course, different duties to perform in their different employments or positions in life, and what is ordinary care in one class of persons may not be so in another, and as has been already stated, *ante*, pp. 2, 10, no act can be said to be *per se* negligent or careful, but only in relation to circumstances. Thus more care will in most cases be expected in a person of education than in an ignorant person, in an adult than in a child; more care will be required in driving in a crowded street than in an empty one, and so forth; but with respect to these distinctions the law pays no further regard to them than to expect all men to use such care as reasonable persons ought to do in such matters, be the same more or less. Upon the other hand, if a person undertakes to do something which, if not done with great skill or care, must be injurious, or, if he is doing something for his own advantage, then the law demands that he shall bring to the execution of that which

he has engaged to do the necessary skill, and take the necessary care in the execution of it. And where the law thinks it expedient that persons exercising certain important functions should be made more than ordinarily careful, it will compel them to be so. These cases will be treated of in Chapter III.

Amongst cases illustrative of ordinary duties requiring no particular skill or care *per se*, and only requiring ordinary care being done for the mutual benefit of both parties, are all those which arise out of employment of services for reward, or where persons come into collision in the course of pursuing their ordinary avocations.

The law relating to master and servant will be found *post* (a), and all that it is desired to say here is that in all cases where ordinary services are rendered for reward, both the employer and employed are liable for ordinary negligence towards one another. Such, for instance, is the case of an ordinary bailee for hire.

In the case of the employment of skilled labour different considerations will arise. It will be seen *post*, Chapter III., that there are many persons from whom the law requires an extraordinary amount of skill, and who will be held liable for what in others would appear to be slight neglect. These will mostly be found to be either public officers to whose services the law compels people to have recourse, or professional persons who have a monopoly or privilege to perform certain services (b). But where a private person who is free to choose whom he will employ selects a person who holds himself out as a skilled labourer, it does not appear that the law will in general hold the person so selected liable for "slight" negligence. It would seem, however, that he must show some degree of skill, and the absence of skill would render him liable for negligence (c). Thus a carpenter must show some knowledge of carpenter's work, a builder of building, &c.,

(a) Ch. II., s. 6.

(b) Campbell, 29, 96, 2nd ed.

(c) Campbell, p. 6, 2nd ed., citing D. xix., 2, 9, s. 6.

and it is obvious that the amount of skill which ought to be shown will vary according to the particular circumstances. The more skill is required for the performance the more will be demanded *in* the performance, at the same time that due allowance is made for the difficulty of performance. So, also, the amount of skill and care demanded will be greater or less according as the consequences of neglect are more or less serious.

It must be owned that the question, what amount of care is to be expected from one who holds himself out as a person competent to do work in an ordinary trade which he follows, is very difficult to answer. The difficulty arises in defining "skill." As soon as it is shown that a man holds himself out to be a person of skill he is then bound to show more than ordinary care. Those cases in which we have thought there can be no doubt upon the subject we have placed in our third chapter; but though there may be no doubt that a medical man is bound to show more than ordinary care, yet it is very doubtful whether the same rule applies to a watchmaker, or to the case (*d*) cited, Mr. Robert Campbell's excellent lectures of a finisher of lustres, and it is still more doubtful whether it applies to a bricklayer or carpenter. As we have before said, no act is negligent *per se*, but is only so where it is a breach of duty, and every man is in duty bound to bring a reasonable amount of skill to the performance of work which he holds himself out as being capable of performing, and it is probably impossible to say where the law would draw the line, and say all those on this side of the line are skilled in the sense that they are liable for slight negligence, and those upon the other side, although in one sense skilled, are only liable for ordinary negligence. It will be undoubtedly seen (*e*) that the law does regard certain skilled persons as bound not merely to exercise such ordinary skill as may be used in their

(*d*) *Hinshaw v. Arden*, Court of Sessions Cases, vol. viii., p. 933.

(*e*) See Ch. III.

profession generally, but to approve themselves to be absolutely skilful. We take it, then, to be the law, that while the jury consider whether in the case of an ordinary avocation the person exercising it has done so with the ordinary skill used by sensible men of his craft, yet that in certain cases more than this sort of skill will be demanded. In ordinary cases the simple practical test is to consider what is the duty which the particular person has to fulfil, and whether he has reasonably fulfilled it. Thus a manufacturer (*f*) of any ordinary article is bound to use reasonable care and skill in seeing that it is fit for the purpose for which it is made or used; but he is not responsible for latent defects, for that would be to make him an insurer. If the person employed engages to show more than ordinary skill, or if the law demands it of him, he will be liable for what might appear to be slight negligence in other circumstances.

So, also, if a person deals with an article that is likely to cause danger, something more than ordinary care would be required (*g*); or if by invitation to use the article he has misled the plaintiff into a feeling of security (*h*).

Persons coming into collision in their ordinary avocations are liable for ordinary negligence, for their duty is to take ordinary care. Thus the owner of premises is liable for ordinary negligence to the persons whom he has allowed to come there for their advantage; for he has undertaken no special responsibility with respect to them as he would have done had he invited them for his own benefit; but I am inclined to think he has taken some higher duty upon him than that of a gratuitous bailee (*i*).

So, also, the liability of host to guest or visitor at his house stands upon the same ground (*k*). The relationship here is not

(*f*) *Randall v. Newson*, 34 L. T. N. S. 527.

(*g*) See *post*, Ch. III.

(*h*) See *post*, Ch. III.

(*i*) *Indemauro v. Dames*, L. R. 2 C. P. 311. These cases will be found

treated of more fully, and the question discussed in s. 2, *Duties of Owners of Property*, p. 30.

(*k*) *Southcott v. Stanley*, 1 H. & N. 248.

that of inviter and invited, where the inviter is liable as we shall see (*l*) for slight negligence; but the guest takes the premises as he finds them, subject only to the duty of the host to warn against any trap. Neither are we speaking here of "host" in the sense of innkeeper, whose position is, as will be seen (Ch. III., s. 9), that he is bound to exercise more than ordinary care. The visitor seems to be in the position of a bare licensee, and accordingly it has been said that the host is only liable for something in the nature of a trap (*m*); but it is to be observed that it is also said that he ought to take reasonable care, that is to say, ordinary care (*n*).

So where a man driving a trap offers a seat to a friend, each pursuing his own business or pleasure, he is liable for ordinary negligence (*o*). The Court said that he is liable for gross negligence only, but I am inclined to think, for the reasons presently given, that he is liable for ordinary negligence (*p*).

Persons driving or riding upon the highways are in the exercise of their lawful and equal rights, and the law imposes upon them the duty of taking ordinary care not to injure one another; and the same with regard to foot-passengers and drivers, for as foot-passengers and drivers of vehicles have an equal right to use the highway (*q*), so they have equal duties to take care to look out for each other (*r*).

The question of the "rule of the road," as it is called, often gives rise to some difficulty. It should be remembered that persons are not bound to keep to the right side of the road (*s*), for there may be many good reasons for going to the other side; but when they are on the other side they ought to exercise more than ordinary care. There may even be occa-

(*l*) *Post*, s. 2, and Ch. III. s. 2.

(*m*) See *per* Bramwell, B., in *Southcote v. Stanley*, *supra*.

(*n*) See this question discussed *post*, Ch. II., s. 2.

(*o*) *Moffatt v. Bateman*, L. R. 3 P. C. 115.

(*p*) See *post*, s. 2.

(*q*) *Boss v. Litton*, 5 C. & P. 407.

(*r*) *Cotton v. Wood*, 8 C. B. N. S. 569; 29 L. J. C. P. 333; *Hawkins v. Cooper*, 8 C. & P. 473; *Williams v. Richards*, 3 C. & K. 81. See also Ch. V., Presumptions of Negligence.

(*s*) *Puckwell v. Wilson*, 5 C. & P. 375.

sions when it would be negligence to drive upon the right side of the road, as when another is on his wrong side (*t*). It seems to be *prima facie* evidence of negligence against a vehicle which has run into another vehicle that the former was on its wrong side. See Chapter VI., Presumptions.

Where a man is walking in a public street, and a barrel falls upon him from a window and injures him, he is entitled to an action against the owner of the barrel, if such owner has been guilty of ordinary negligence (*u*). This case, and those above mentioned, afford very good illustrations of the truth that an act is not negligent *per se* but only in relation to circumstances, and that in some circumstances more care is required than in others. A man driving or lowering a barrel in Cheapside must use more care than would be required of him in a country lane; but this is a distinction of fact and not of law.

Persons who undertake to manage ships are undertaking a matter requiring more skill and involving probably more serious dangers than riding or driving. The question of their liability is somewhat complicated, and will be found treated of in the last section of Chapter III., *post*.

SECTION II.

Duties of Owners and Occupiers of Real Property.

The rights which a man has over his own land are, like other rights, subject to modification by the conflicting rights of others. The allegation of negligence presupposes, as we have seen (*x*), the existence of equal rights. Where a man is

(*t*) *Clay v. Wood*, 5 Esp. 44; *Wade v. Carr*, 2 D. & R. 255; *Turley v. Thomas*, 8 C. & P. 103 (a saddle-horse case).

(*u*) *Byrne v. Boadle*, 2 H. & C.

722. This class of cases, however, will be found under the heading Duties of Owners and Occupiers of Property, s. 2, *infra*.

(*x*) Ch. I., p. 3.

exercising a right upon his own land, and, in doing so, disturbs the right of another, the former right may be dominant or subordinate, in either of which cases no question of negligence arises. If A digs a hole in his land, and B, who has a right to personal security (but no right to be on the land), falls into it, A's right is paramount to B's, and no question of negligence arises (*y*); but if A had permitted B to come upon his land, the rights would be equal, and questions of negligence would arise, viz., whether the pit was negligently left unguarded, and whether B was using his right of being there with care (*z*). If A is owner of the surface of the land, and B has rights of mining beneath, or beneath adjoining land, A's right of support for his land is paramount, and it is no answer that B has used the utmost care (*a*). So if A digs a hole near the edge of his land, and causes B's ancient house to fall, no question of negligence arises, but a wrong has been committed, whatever care may have been taken (*b*). These questions of right of support do not come within the bounds of this treatise. But in the case of a house recently built upon adjoining land, it may be that the rights are equal, and that the adjoining owner is answerable for negligence only in the exercise of his right to use his own land. This is a question, however, which is involved in much doubt. Upon the one hand many expressions of the judges will be found which support the proposition above stated (*c*), while the case of

(*y*) *Knight v. Abert*, 6 Penn. St. 472. See *post*, as to excavations, p. 31.

(*z*) *Williams v. Groucott*, 4 B. & S. 149.

(*a*) *Humphries v. Brogden*, and other cases.

(*b*) It is said in *Shearman*, s. 497, that the true test is, that, although not liable for the natural consequences of withdrawing the support, "yet a man must act with such care and caution that his neighbour shall suffer no more injury than would have accrued if the structure had been put where it is without ever having had the support of his land." This would

seem to be a very difficult test to apply practically. In *Hilton v. Earl Granville*, 5 Q. B. 701, and in *Hilton v. Whitehead*, 12 Q. B. 734, in one count negligence was alleged in excavating under a house. It was also alleged in *Humphries v. Brogden*, but was there superfluous. These matters are discussed at great length in the judgments in *Angus & Co. v. Dalton and Commissioners of Her Majesty's Works*, 47 L. J. Q. B. 163; L. R. 3 Q. B. D. 85.

(*c*) *Bradbee v. Christ's Hospital*, 4 M. & G. p. 758; *Dodd v. Holme* 1 A. & E. 493; *Davis v. L. &*

Gayford v. Nicholls (*d*) is, I think, a clear authority to the contrary. The text-writers appear generally to doubt what the law is. After saying that the surface owner is entitled as against the miner to support, Messrs. Shearman and Redfield, in their work upon the "Law of Negligence," s. 506, say that "it does not appear to have been decided whether the surface owner has a similar right to support for buildings erected by him upon the land, but we think he should have. The miner is undoubtedly liable for damage done to such buildings by his negligence." It does not appear whether the writers are speaking of *lateral* support or not; nor whether they are speaking of *ancient* houses or not. Mr. Wharton says, s. 929, "Wherever the *owner* of the soil has the right, so far as concerns adjoining buildings, so to excavate, he must exercise this right with the diligence good builders are in this respect accustomed to employ in similar circumstances;" and he cites *Jeffries v. Williams* (*e*) and other cases; but *Jeffries v. Williams* was not a case of an *owner*. Here again, also, the meaning of the passage is somewhat obscure.

Mr. Goddard, in his admirable treatise on the "Law of Easements" (2nd. ed.), p. 41, after pointing out that it was thought in *Rogers v. Taylor* (*f*) that there was a distinction between subjacent excavations and adjacent, determines that "support for buildings is an easement which must be acquired, not a natural right. So, also, a man may, after his land has been excavated for twenty years, acquire an easement for support of the adjacent land in addition to his natural right." So far he appears to be dealing with a paramount right, and he does not say what would be the effect of excavating negligently near a modern house. He remarks that "though it is rather beyond the scope of this treatise, the mere fact of contiguity of buildings

Blackwall Ry. Co., 3 Scott. 699; 1 M. & Gr. 799; *Harris v. Ryding*, 5 M. & W. 60, and other cases.

(*d*) *Gayford v. Nicholls*, 9 Exch. 702.

(*e*) *Jeffries v. Williams*, 5 Exch. 792.

(*f*) *Rogers v. Taylor*, 2 H. & N. 828; 27 L. J. Ex. 173.

imposes an obligation on the owners to use due care," and it is submitted that this might be extended to the point in question.

Mr. Gale discusses this question at considerable length (see 5th ed. by Gibbons, 419-446). In the case of adjoining buildings he states the law to be, that a man must use no unnecessary violence in removing an encroachment, but, with this limit, is entitled to the free use of his own property; and in the case of excavating near a modern house, p. 446, note, "if the mere removal occasions the damage, he is not liable, however negligent; but if the *manner* of the removal extends his acts beyond the limits of his own property, and is a trespass upon the plaintiff's land, he is liable."

The doubtful state of the law is also noticed in 2 Wms. Saunders, note to *Smith v. Martin*, p. 802, note (a).

On the whole, I think it is not unreasonable to say that an owner of land has a right to dig in his own ground, close beneath or close beside his neighbour's modern house, and his neighbour has a right to live safely on the edge of his own land, and the law reasonably regards the two rights as equal; and, as a consequence, a negligent exercise of such rights is actionable as negligence; but in the case of an ancient house, the law reasonably says that the right of the owner of the house is paramount.

In the case of adjoining houses there can, I think, be no doubt that a presumption may arise from length of time, or other circumstances, of an absolute right to lateral support (g); and then the question of negligence does not arise, for the right to support is paramount; and further, that where this presumption cannot be made, it often becomes a question whether, from the mere fact of contiguity, the defendant has

(g) See *per* Cockburn, C. J., in *Angus v. Dalton*, L. R. 3 Q. B. D. at p. 116. See S. C. on appeal, 4 Q. B. D. 162; 43 L. J. Q. B. 225. "It is doubtful," says Mr. Goddard, 2nd ed.,

p. 187, "whether a lateral support for one building from another can be acquired by prescription. At all events, it may be acquired by grant, express or implied."

been negligent or not in removing the lateral support (*h*), and if he has, he is liable to an action for negligence.

So, also, in the case of adjoining mines, the question will arise whether there is a paramount right, or whether the rights are equal? (*i*) If there is a mere user of a paramount right of property, there is no ground for an action of negligence; but if something is done by the owner of property which is not the necessary or ordinary user of his property, but something which alters the character of his property and so injures his neighbour, the question of negligence arises, for he is no longer in the exercise of a paramount right (*k*).

The duty to take care having arisen, the next question is, what is the amount of care which should be taken? This is governed by the general principles stated *ante*, pp. 8, 9, so that where an owner of property is using his property for his own advantage only, he is bound to take more than ordinary care (*l*); where for the benefit of both parties, ordinary care; and where for the benefit of another, less than ordinary care.

The owner of realty is liable, like the owner of personalty, neither more nor less for negligence (*m*), and is no more responsible for the consequence of the user of it in a manner in which it was never intended to be used than is the owner of personal property (*n*).

Where the rights are equal, as where a person is upon the premises in the exercise of a right, as in the right of navigation of a river (*o*), or the right of passing along a

(*h*) *Walters v. Pfeil*, 1 M. & M. 362; *Dodd v. Holme*, 1 A. & E. 493; *Massey v. Goyder*, 4 C. & P. 161; *Goddard*, p. 42; *Peyton v. London (Mayor of)*, 9 B. & C. 725 (no occasion to shore up adjoining building); *Chadwick v. Trower*, 6 Bing. N. C. 1 (no occasion to give notice to owner—defendant must have notice or knowledge of the danger).

(*i*) *Smith v. Kenrick*, 7 C. B. 515.

(*k*) Compare *Wilson v. Waddell*,

L. R. 2 App. Cas. 95; and *Fletcher v. Smith*, 2 App. Cas. 781.

(*l*) *Smith v. Fletcher*, L. R. 2 App. Cas. 781. See this case *post*.

(*m*) *Reedie v. North-Western Ry.*, 4 Exch. 244.

(*n*) *Fanjoy v. Scales*, 29 Cal. 243 (builder placed staging upon the cornice of a building; held, owner of building not liable).

(*o*) *White v. Phillips*, 15 C. B. N. S. 245.

highway (*p*), or some other right (*q*), or has come by invitation (*r*), express or implied (*s*), the owner of the property will be liable for negligence of some degree, according to circumstances. Very usual examples of this kind of negligence will be found *post*, Ch. II., s. 4, as to Wharfowners, and Ch. III., s. 7, "Carriers," as to Railway Companies.

The question, what sort of care the owner of property ought to take towards a person *invited* upon his premises, is governed by the ordinary rules stated *ante*, pp. 8, 9 and 28, but is, I think, subject to some modification. If for his own benefit only, he is bound to take more than ordinary care (*t*); if for the mutual benefit of both parties, ordinary care at the least (*u*); and if for the benefit of the person invited, perhaps something less than ordinary care (*x*).

It is not within the scope of the present work to enter into a discussion of the law of Nuisance. But it not unfrequently happens that that which is a nuisance to the public at large, causes an injury to an individual distinct from that which he suffers in common with the public. For that which he suffers in common with the public he has no remedy by action, even although he suffers in a greater degree (*y*).

(*p*) *Church of the Ascension v. Buckhart*, 3 Hill 193; *Kearney v. L. B. & S. Ry. Co.*, L. R. 5 Q. B. 411; 6 Q. B. 759; 40 L. J. Q. B. 285 (brick fell from railway bridge upon plaintiff in highway); *Byrne v. Boadle*, 33 L. J. Ex. 13; 2 H. & C. 722 (barrel from window upon plaintiff in highway).

(*q*) *Scott v. Liverpool Dock Co.*, 3 H. & C. 59; 34 L. J. Ex. 17 (sugar-bags fell from a lift upon plaintiff, who was there as custom-house officer to inspect); *Welfare v. L. B. & S. C. Ry. Co.*, L. R. 4 Q. B. 693; 38 L. J. Q. B. 241 (roll of zinc fell from roof where defendant's man had a right to be; plaintiff looking at time tables where he had a right to be; held, that as a matter of fact there was no evidence of negligence).

(*r*) *Chapman v. Rothwell*, El. Bl.

& El. 168; *Smith v. London Docks Co.*, L. R. 3 C. P. 326; 37 L. J. C. P. 217; *Tebbutt v. Bristol Ry. Co.*, L. R. 6 Q. B. 73; 40 L. J. Q. B. 78; *Holmes v. North-Eastern Ry.*, L. R. 6 Exch. 123; 40 L. J. Ex. 121. This class of cases comes within our second division, and will be found treated of *post*, Ch. III.

(*s*) *Indermaur v. Dames*, L. R. 2 C. P. 311; 36 L. J. C. P. 181.

(*t*) This will be treated of *post*, Ch. III., division 2, Neglect by Owners of Property.

(*u*) *Campbell*, 2nd ed., p. 61; or perhaps more—see *post*, Ch. III.

(*x*) This falls within Ch. IV.; but see *post*, p. 30.

(*y*) *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316; 36 L. J. Ex. 194.

Generally speaking, if a nuisance is created, and any one is injured by the nuisance in a particular manner, and not in common with the public, an action of negligence will lie (z). This is the principal of the decisions as to injuries arising from excavations or obstructions upon or near to roads and paths upon which strangers have a right to be, and which we shall presently consider.

Where there is no nuisance, but a person having come upon the land without invitation (a), the owner having only passively acquiesced in his coming, sustains injury by reason of a mere defect in the premises, the owner is not liable for negligence, for such person has taken all the risk upon himself (b). But such owner will be liable for anything in the nature of a *trap* upon the premises, known to him, and as to which he gives no warning to the licensee (c). He must not do anything to alter the premises, so as to be likely to cause injury, without notice to the licensee (d). Upon the whole I incline to think, with Mr. Campbell (e), that the owner is bound to take ordinary care with respect to a bare licensee. The question is, as I think, one of great difficulty. It is said that the licensee being there merely for his own advantage can only demand that slight care which a gratuitous bailee is bound to display, and so far the proposition is correct; but I am not sure, if a gratuitous bailee were to indicate a place of deposit, whether he would not be undertaking that that particular place was reasonably fit for the deposit, and if so, a similar argument would apply to an owner who gives leave to come upon his property, viz., that he has undertaken that his property is in some degree fit for the licensee to use. If

(z) *Barnes v. Ward*, *post*; *Hounsell v. Smith*, *post*, p. 31.

(a) The question of invitation is treated of in Ch. III., s. 2.

(b) *Gautret v. Egerton*, L.R. 2 C.P. 371; 36 L. J. C. P. 191; *Hounsell v. Smith*, *post*. See also *Wilkinson v. Fairie*, 32 L. J. Ex. 73 (dark passage and staircase).

(c) *Southcote v. Stanley*, 1 H. & N.

247; *Seymour v. Maddox*, 16 Q. B. 326; *White v. France*, L.R. 2 C.P.D. 308; 46 L. J. C. P. 823; *Bolch v. Smith*, 7 H. & N. 736; *Pickard v. Smith*, 10 C. B. N. S. 470.

(d) *Corby v. Hill*, 4 C.B.N.S. 556; 27 L. J. C. P. 318; *Gautret v. Egerton*, *supra*.

(e) Pp. 119-122. See also *Wharton*, s. 349.

this be so, it seems that he ought to take ordinary care. The Courts, however, have distinctly held that the owner is only liable for "gross" negligence, because he is in the same position as a gratuitous bailee (*f*); but I am inclined to think the assumption is not accurate. I think that the question is only further obscured by insisting that the owner must be guilty of an act of *commission* to render him liable to the licensee (*g*). It may be very frequently the case that omissions are slighter neglects than acts of commission; but they may very well be the contrary, and sometimes are so. If the neglect be of a grave and obvious character, it would matter nothing whether it was an omission or commission. For instance, it would matter nothing whether a signalman omitted by grave and obvious negligence to pull the handle to direct an express upon its proper line, or whether he negligently pulled the wrong handle.

Where there is something done by the owner which is in the nature of a nuisance or of a wanton injury, he will be liable to an action for negligence even by a trespasser (*h*), as if an owner of premises with great recklessness shot a trespasser, or if the owner set spring guns upon his premises and injure a trespasser (*i*).

Upon this principle it has been held that where an owner or occupier of lands makes an excavation upon his land so near to a public highway as to be dangerous under ordinary circumstances to persons passing by, it is his duty to take reasonable care to guard such excavation; and he is liable for injuries caused, even if such persons are consciously (*k*) or unconsciously (*l*) straying from the way (*m*).

(*f*) *Moffatt v. Bateman*, L. R. 8 C. P. 115; *Corby v. Hill*, *supra*; *Gautret v. Egerton*, *supra*.

(*g*) See *Southgate v. Stanley*, 1 H. & N. 248; *Corby v. Hill*, *supra*.

(*h*) *Degg v. Midland Ry.*, 1 H. & N. 773, at p. 780.

(*i*) *Bird v. Holbrook*, 4 Bing. 628; *Wooten v. Dawkins*, 2 C. B. N. S. 412.

(*k*) *Blyth v. Topham*, Cro. Jac. 158; *Knight v. Abert*, 6 Penn. St. 472.

(*l*) *Hounsell v. Smith*, 7 C. B. N. S. 731; *Barnes v. Ward*, 9 C. B. 392.

(*m*) It is no answer to say that some other persons are bound by statute to fence the highway, *Welter v. Dunk*, 4 F. & F. 298.

Where the excavation is at a considerable distance no such care need be taken. What is a considerable distance it is impossible to say, and, in truth, each case depends upon its own facts (*n*).

A person who negligently or intentionally set fire to any thing on his own land was liable at common law to another, if the fire extended to his property and injured it (*o*), and the statute 6 Anne, c. 31, and the Buildings Act, 14 Geo. III. c. 78, which refer only to accidents, do not protect a person guilty of such culpable negligence (*p*).

Where a hay-rick was carelessly put together and ignited, doing damage to the plaintiff's cottage, the jury was directed that the plaintiff could recover in an action for negligence (*q*). It has been held in America that a person who uses a steam-engine on his own land ought to use the ordinary means of preventing the sparks from doing injury to his neighbour (*r*), and in England the general principle of the common law that when a man brings upon his land, or uses there a thing of a dangerous nature, he must keep it in at his own peril, and is liable for the consequences if it escapes and injures his neighbour without any negligence being alleged, has been fully established (*s*). Such cases are, therefore, outside of the scope of the present work, when it has once been determined that the thing kept is so dangerous as to come within the rule. The question, what is a dangerous thing? must be one for the jury. In the case of sparks from railway engines the

(*n*) In *Hardcastle v. South Yorks. Ry.*, 4 H. & N. 67, and in *Binks v. S. Y. Ry.*, 3 B. & S. 244; 32 L. J. Q. B. 28, twenty-four feet was held to be such. In an American case, one or two feet off the road was held sufficient to protect the defendant from an action, *Howland v. Vincent*, 10 Metc. 371; but this case is of doubtful authority. See *Shearman*, p. 599; *Bigelow on Torts*, p. 698. As to excavations, &c., made by corporations acting under statutory powers, see Ch. III., s. 7, *post*.

(*o*) Year Book, 2 H. 4, f. 18, pl. 6.

(*p*) *Filliter v. Phippard*, 11 Q. B. 347; *Tuberfield v. Stamp*, 1 Salk. 18, note (*a*).

(*q*) *Vaughan v. Menlove*, 7 C. & P. 525; 3 Bing. N. C. 468; for injuries from explosions of gas, see Ch. III., s. 5.

(*r*) *Teall v. Barton*, 40 Barb. 137.

(*s*) *Jones v. Festiniog Ry. Co.*, L. R. 3 Q. B. 733; 37 L. J. Q. B. 214 (sparks from engine); *Fletcher v. Rylands*, L. R. 3 H. L. 330; 37 L. J. Ex. 161 (water in mine).

Legislature has interfered to protect the users of such engines, who are then acting in pursuance of parliamentary powers, and only liable if negligence is proved (*t*).

In *Tuberfield v. Stamp* (*u*) it was held by three judges out of four, upon the principle that every man must use his own property so as not to hurt another, that a farmer was liable in an action for negligence for injury done to corn in another's close by burning stubble, unless he proved that a sudden storm had risen. Turton, J., dissented, on the ground that such a doctrine would discourage industry. The allegation that he *negligenter custodivit* was (it is presumed) proved, and if so the decision seems clearly sound on that ground; but no doubt it can be supported on the principle stated in the text, viz., that the defendant was bound to keep the fire on his own premises. The American cases, which will be found in "Shearman on Negligence," Chapter XX., are instructive and very conflicting, but to discuss them would take up too much space. It is obvious that what may be very negligent in a dry or stormy country may be consistent with reasonable care in a humid and mild climate. In *Smith v. South Western Railway Company*, *ante*, Ch. I., p. 14, where the fire extended from the railway line across a hedge and stubble field to the plaintiff's cottage, the Court said that the railway company, having been negligent in leaving cut grass upon the bank in dry weather, were answerable for all the consequences. The question of remoteness of damage is treated of *ante*, Ch. I., p. 13.

Of a similar character are the cases where a man plants a poisonous tree, or uses a dangerous substance upon his land; he must, at his peril, see that he does not injure his neighbour (*v*).

(*t*) *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 685. In the case of locomotives under the Highway Acts the owners are not protected. See *Powell v. Fall*, C. A., March 18, 1880.

(*u*) 1 Salk. 13.
(*v*) *Crowhurst v. Amersham Burial Board*, L. R. 4 Ex. D. 5; 48 L. J. Ex. 109 (horse poisoned by yew trees growing through railings); *Firth v.*

The same principle is applicable to the bringing of water upon a man's own land: he must keep it in at his peril (*x*), and it is no defence to say that there was no negligence, nor even that there was the greatest care. The only defence which can be raised is that the escape of the water was by the act of God, or *vis major* (*y*). With respect to water which is not brought by the owner upon the land but comes or exists naturally there, he is liable for negligence in the user of it (*z*). If he diverts the whole or any part of the water of a stream from its natural course he is responsible absolutely without any allegation of negligence to anyone entitled to have the water flow in its natural state (*a*), unless he is entitled by some grant or prescription to interfere with the natural flow of the stream (*b*).

In no part of this treatise is it more necessary to observe the rule already laid down (*c*), that negligence only arises where the rights are equal, than in the subject we are now about to consider, viz., the duties of the owners of real property with respect to water and watercourses. Thus, as we have just said, if a man brings water in a dangerous state upon his land, his right to do so is subordinate to his neighbour's right to have his land free from such danger. So, also, the right of a man to take water from his own watercourse, or to add to it in quantity or injure its quality, is subordinate to his neighbour's right to have the accustomed stream flow down to him. All such matters, therefore, are beyond the

Bowling Iron Co., L. R. 3 C. P. Div. 254; 47 L. J. C. P. 358; Wilson v. Newberry, L. R. 7 Q. B. 31, distinguished (cow killed by eating portions of wire rope). As between landlord and tenant, see Erskine v. Adeane, L. R. 8 Ch. App. 756; 42 L. J. Ch. 835.

(*x*) Fletcher v. Rylands, *supra*; Smith v. Fletcher, L. R. 7 Ex. 305; L. R. 2 App. Cas. 781; 41 L. J. Ex. 193; 43 L. J. Ex. 70. This is not the law in America, see Losee v. Buchanan, 51 N. Y. 476.

(*y*) Nichols v. Marsland, L. R. 2 Ex. D. 1; 46 L. J. Ex. 174.

(*z*) Whitehouse v. Birmingham Canal Co., 27 L. J. Ex. 25; Firmstone v. Wheeley, 13 L. J. Ex. 361 (removing a natural barrier of a stream).

(*a*) Wood v. Waud, 3 Exch. 748; Dickenson v. Grand Junction Canal Co., 7 Exch. 299, and many other cases. Shearman, p. 659.

(*b*) Bealey v. Shaw, 6 East. 214; Acton v. Blundell, 12 M. & W. 353.

(*c*) *Ante*, p. 3.

scope of the present work. It is only where the rights of the parties are equal, and where if injury arose there would be no remedy in the absence of negligence, that the question of negligence arises. This may be well illustrated by the case of erecting a dam in a river. If the circumstances connected with the river, the adjoining property, and the dam are of such a nature that injury to his neighbour's paramount right is the result of what the owner of the property does, and no care in the doing of it would make any difference, then the owner is doing a wrong or trespass, for which an action would lie, irrespective of any allegation of negligence; but if the circumstances connected with the river, the adjoining property and the dam were such that if care were taken no injury to any paramount right would arise, then no action would lie for injury done unless negligence were proved. The dam in the former case is a dangerous thing which a man erects at his peril, and the right to do so is subordinate to his neighbour's right to hold his lands free from danger; while, in the latter case, it is only the exercise of a right to use his property so as not to injure his neighbour, which is equal to his neighbour's right to enjoy his own property. If, therefore, by some unusual and sudden accident the dam in the latter case causes injury, the owner is not liable for the injury; but if he has been negligent in respect of the dam he is liable for such negligence (*d*).

The case of *Harrison v. Great Northern Railway* (*e*) was a somewhat singular one, and is very instructive. The defendants had undertaken to maintain a cut. The banks were not sufficient to resist the pressure of the water which they *could* contain. The cut ran into the river Witham, and the

(*d*) The law is well illustrated by the following cases: *Bagnall v. L. & N. W. Ry. Co.*, 7 H. & N. 423, aff. 1 H. & C. 544 (company cut into soil over mine, and built bridge over stream, and neglected to repair drains—held liable for negligence); *Blyth v. Bir-*

mingham Waterworks Co., 11 Exch. 781 (company not liable for bursting of pipes in extremely cold winter); *Harrison v. Great Northern Ry.*, 3 H. & C. 231 (bursting of bank of drain).

(*e*) *Supra*.

Witham Commissioners neglected to cleanse the river, by reason of which neglect the cut became full of water and burst its banks. The cut would not have burst except for the wrongful conduct of the commissioners. There was no sudden storm or sudden wrongful act done by the commissioners. It was held, not that having brought the water there the defendants were bound to restrain it, but that the bank was defective by reason of the negligence of the defendants, and that the defective bank was the proximate cause of the injury, notwithstanding the obligation upon the commissioners to cleanse the outlet.

Another interesting case is that of *Fletcher v. Smith* (e). There the owner of property had for his own convenience diverted a stream, making a new channel, but negligently making such channel insufficient. The water had flowed down from the defendant's to the plaintiff's mine through cracks, caused by the ordinary working of the defendant's mine, and if the ordinary watercourse had, in consequence of such ordinary working, run through the cracks, it appears from the judgment (citing *Wilson v. Waddell*, 2 App. Cas. 95) that the defendant would not have been liable, that is to say, he would have been exercising a paramount right of property; but when he chose to alter the watercourse he was exercising no such paramount right, but a right which was no greater than the plaintiff's right to have his own land free from any unusual flow of water caused by the defendant's acts.

The owner or landlord of a house is generally responsible for the original construction, &c., of the pipes, cisterns, &c., unless some agreement has been come to to the contrary, and the tenant is only responsible for the way in which he uses them (f). Where the tenant of an upper floor does not know of the defective state of his receptacle for water, and there is no negligence in his mode of dealing with it, and it overflows and injures the room of the tenant below, the doctrine of

(e) *Fletcher v. Smith*, L. R. 2 App. Cas. 781; 43 L. J. Ex. 70.

(f) See *Shearman*, ss. 512—514.

Fletcher v. Rylands, *ante*, p. 32, does not apply (*g*), and he is not obliged to keep his pipes from overflowing in any event, but is only liable for negligence. Probably the tenant of the upper floor would be liable in an action for negligence if he had notice of the dangerous state of the pipes and did not remedy the defect, although he did no other act of negligence.

A landlord is liable for his own negligent misfeasance in the construction or upholding of his property (*h*), but not for the negligence of his tenant. Thus, the landlord is liable for the consequences of a nuisance (as an obstruction of ancient lights), even after he has leased the premises (*i*); and he is liable for defects which existed before he parted with the property (*k*). It seems, however, that if the owner had no means of knowing, and in fact did not know of the defect, and the tenant has covenanted to repair, the owner is no longer liable (*l*).

If the owner has covenanted to do the repairs, then he is, of course, responsible for them as far as the tenant is concerned, and is also liable to third parties (*m*); but if the tenant by his own negligent conduct makes the property injurious to others he cannot shelter himself under a covenant by the landlord to repair the mischief (*n*).

A landlord, however, is not liable to the *guests* of his tenant, even for injuries caused by defects existing before the creation

(*g*) *Ross v. Feddon*, 41 L. J. Q. B. 270; L. R. 7 Q. B. 661.

(*h*) *Nelson v. Liverpool Brewery Co.*, L. R. 2 C. P. D. 311; 46 L. J. C. P. 675.

(*i*) *Rosewell v. Prior*, 2 Salk. 460; *Rex v. Padley*, 1 A. & E. 827; *Gaudy v. Jubber*, 5 B. & S. 78, 485; *Leslie v. Pounds*, 4 Taunt. 649. See *Bartlett v. Baker*, 3 H. & C. 153 (piles put in river by defendant, sold to another, who cut them off and did not remove them. Defendant not liable).

(*k*) *Alston v. Grant*, 3 El. & B. 128; *Cheetham v. Hampson*, 4 T. R. 318.

(*l*) *Gwinnell v. Eamer*, L. R. 10 C. P. 658, following *Pretty v. Bickmore*, L. R. 8 C. P. 401. The contrary seems

to have been held in America, *Taylor v. New York*, 4 E. D. Smith. 559.

(*m*) *Payne v. Rogers*, 2 H. Bl. 350; *Todd v. Flight*, 9 C. B. N. S. 377; *Nelson v. Liverpool Brewery Co.*, L. R. 2 C. P. D. 311; 46 L. J. C. P. 675. Where a tenant left his area open to the street it was held no defence that it had always been so, time out of mind: *Coupland v. Hardingham*, 3 Camp. 398. See *Procter v. Harris*, 4 C. & P. 337; *Daniels v. Potter*, *ib.* 26 (cellar flaps); *Hadley v. Taylor*, 14 W. R. 59; 13 L. T. N. S. 368.

(*n*) *Pickard v. Smith*, 10 C. B. N. S. 470.

of the lease (*o*); unless, indeed, he knows that strangers will be invited, and that the premises are unsuitable for such invitation of strangers (*p*).

In the absence of a covenant in the lease a landlord is not answerable for injuries to the cattle of third parties from his tenant's neglect to repair fences (*q*). Nor is he, at common law, under any obligation to fence as between himself and his tenants (*r*).

We naturally come at this place to consider what is the obligation upon owners of real property with respect to fencing in cattle. An owner of cattle is bound, as we shall see, to exercise a reasonable control, or ordinary care, over his tame animals, and no doubt one mode of doing that is by the erection of fences, but care may, of course, be taken in many other modes, as by tethering, watching, or keeping in out-houses; and this subject will be found treated of in the next section, tit. "Animals" (*s*). It is true that owners and occupiers of land are under no duty at common law to fence out cattle (*t*), but persons who keep cattle must see that they do not trespass upon the land of others (*u*). Again, owners or occupiers may be bound by prescription, or usage, or covenant, to fence (*x*), and then their obligation is absolute, and the question of negligence does not arise (*y*). Even in this case it must be remembered that it is only the adjoining owner who can complain of the non-repair of the fences, and a third person injured by such breach of the obligation cannot bring an action for such breach (*z*). It has been well

(*o*) *Robins v. Jones*, 15 C. B. N. S. 221.

(*p*) *Godley v. Hagerty*, 20 Penn. St. 387; *Stratton v. Staple*, 59 Maine 94.

(*q*) *Cheetham v. Hampson*, 4 T. R. 318; *Payne v. Rogers*, 2 H. Bl. 350.

(*r*) *Erskine v. Adeane*, L. R. 8 Ch. 756; 42 L. J. Ch. 835.

(*s*) See *post*, s. 3, Animals.

(*t*) 1 Wms. Saunders, 559, note (*b*), ed. 1871; *Wells v. Howell*, 19 Johns. 335. In America different rules pre-

vail in different states upon this point, see *Shearman*, Ch. XIX.

(*u*) *Boyle v. Tamlyn*, 6 B. & C. 337.

(*x*) *Firth v. Bowling Iron Co.*, *ante*, p. 33 (cows eating iron fencing); *Lawrance v. Jenkins*, L. R. 8 Q. B. 274; 42 L. J. Q. B. 147 (cows eating yew tree).

(*y*) *Boyle v. Tamlyn*, *supra*; *Barber v. Whiteley*, 34 L. J. Q. B. 212; *Lawrance v. Jenkins*, *supra*.

(*z*) *Cheetham v. Hampson*, *supra*; *Shearman*, s. 322.

pointed out that the injury done to an animal straying is generally caused not immediately by the fence, but by something in the field, and that there must be some negligence in respect of that which is in the field before the defendant can be made liable, otherwise the damage would be too remote (*a*). If the danger in the field is one which could have been reasonably foreseen, the defendant will be liable for negligence (*b*). The sufficiency of the fence is, of course, a question for the jury. It should be of sufficient height and strength to keep out animals such as are ordinarily kept in fields (*c*). It should be remembered that we are not here dealing with questions of trespass. A man is bound to restrain his animals from trespassing, and is liable in trespass for the injuries which they do, whether his fences are carefully or negligently kept (*d*).

Railway companies are frequently bound by their Acts to keep up fences for the protection of the owners of cattle, not for protection of passengers by train (*e*). In America it seems this protection is usually extended to all owners, whether their land is contiguous to the line or not (*f*); but in England the protection is confined to adjoining owners or occupiers (*g*).

They are also frequently bound by their Acts to fence off, by gates or otherwise, a highway crossing the line upon a level, and they become liable for negligently omitting to keep such gates closed where cattle are straying upon such highway or are lawfully travelling along it (*h*). But where a

(a) *Shearman*, s. 324.

(b) *Powell v. Salisbury*, 2 Y. & J. 391; see judgment of Byles, J., in *Lee v. Riley*, 34 L. J. C. P. 212, 216 (horse straying); *Firth v. Bowling Iron Co.*, *ante*, p. 33 (cows eating iron fencing).

(c) *Bessant v. G. W. Ry. Co.*, 8 C. B. N. S. 368; *Chicago Ry. Co. v. Utley*, 38 Ill. 410.

(d) Whether this extends to trespasses by smaller animals, such as dogs, cats, fowls, &c., seems doubtful. See *Reed v. Edwards*, 17 C. B. N. S.

245.

(e) *Buxton v. N. E. Ry. Co.*, L. R. 3 Q. B. 549; 37 L. J. Q. B. 258.

(f) *Shearman*, s. 469.

(g) *Ricketts v. East India Docks Ry. Co.*, 12 C. B. 160; *Dawson v. Midland Ry. Co.*, L. R. 8 Exch. 8; *Marfell v. S. W. Ry. Co.*, 29 L. J. C. P. 315, 317. See *Railways Clauses Act*, 1845, s. 68.

(h) *Fawcett v. North Midland Ry. Co.*, 16 Q. B. 610. As to level crossings, see the *Railways Clauses Act*, 1863, 26 & 27 Vict. c. 92, ss. 5, 6, 7.

highway runs parallel with the railway the owners of cattle coming out of fields beyond the highway are not owners or occupiers of adjoining lands, but the highway is the adjoining land and the railway company is not liable (*i*).

Where cattle are by permission of the railway company upon land of their own adjoining the railway, the company are not liable for injuries done to such cattle upon their line, as the statute only applies to adjoining owners (*k*), but the company are liable if they have been negligent in omitting the performance of other duties apart from their statutory duty (*l*).

Where the fences, &c., are properly kept by the company they have fulfilled their statutory duty; but it remains that they should exercise ordinary care with respect to cattle straying upon the line, and if the company know or ought to know that cattle are upon the line (*m*) and do not take care to have them removed, they are liable in an action of negligence in the same manner as any other person would be who neglected so obvious a duty.

SECTION II.—SUB-SECTION I.

Neglect of Duties of Wharf and Dock Owners.

Owners and occupiers of wharves and docks are bound to use care that their wharves and docks are fit not only for the

(*i*) *Manch., Sheff. & Linc. Ry. v. Wallis*, 14 C. B. 213. If the cattle were lawfully passing along the highway it seems the owner would be an occupier of the highway and the company would be liable, see 14 C. B. 224, *supra*; and see *Midland Ry. Co. v. Dakin*, 17 C. B. 126.

(*k*) *Marfell v. S. Wales Ry. Co.*, 29

L. J. C. P. 315.

(*l*) *Marfell v. S. Wales Ry. Co.*, *supra* (the plaintiff had paid toll for the use of a tramway adjoining the railway—held, the company ought to take reasonable care his horses were not injured).

(*m*) *Shearman, s. 472*; *Marfell v. S. Wales Ry. Co.*, *supra*.

use of vessels, and for the persons impliedly invited to enter the docks, but also for those persons whose business leads them to frequent the docks (*n*), and it is immaterial whether they pay for the wharfage or not (*o*). The wharf-owner is not an insurer of the safety of the vessels using the dock or wharf (*p*), but he seems to be bound to take something more than ordinary care of vessels or persons coming upon his property under an express or implied invitation (*q*).

Moreover it is usually the case that the dock or wharf-owner exercises his rights under the powers of an Act of Parliament, and therefore not only is he bound to exercise more care because the vessel or person has come to him upon invitation, but also because he is performing a statutory duty laid upon him in consideration of benefits conferred by the statute. This subject is therefore more fully treated of in Ch. III., s. 4.

SECTION III.

Animals.

Persons having the control of animals, whether owners or not, are in general liable for injuries occasioned by a want of ordinary care in controlling such animals (*r*). In the case of "savage" animals, such as lions, tigers, &c., a man must keep

(*n*) *Manley v. St. Helen's Canal Co.*, 2 H. & N. 840.

(*o*) *White v. Phillips*, 15 C. B. N. S. 245 (camp-shed by side of wharf negligently left out of repair).

(*p*) *Exchange Fire Ins. Co. v. Delaware, &c., Canal Co.*, 10 Bosw. 180.

(*q*) *Smith v. London Docks*, L. R. 3 C. P. 326 (ship's officer invited plaintiff; defendant provided gangway,

which was insecure); *White v. France*, L. R. 2 C. P. D. 308; 46 L. J. C. P. 823 (defendant's servant told plaintiff to go to defendant's wharf to complain of defendant's boat; bale of goods fell on plaintiff), see *post*, Ch. III., s. 4.

(*r*) *Tenant v. Goldwin*, 6 Mod. 314; *Boyle v. Tamlyn*, 6 B. & C. 337; *Shearman*, s. 185; *Wharton*, Ch. VII., ss. 100, 904, *et seq.*

them from doing harm at all events, and no amount of care will relieve him from liability in respect of injuries caused by them. Probably one ground of this is that he must be supposed to know the extreme danger he is incurring in keeping such animals, and to take all the risk, as in the case of dangerous things, such as fire or water, referred to *ante*, p. 32. In *May v. Burdett* (*a*) it is said that the gist of the action is the keeping of the animal (a monkey) after *knowledge* of its mischievous propensities. In an American case, where an elephant by its mere appearance frightened a horse, it was held that the owner was not liable (*b*).

So, also, the question of knowledge by the owner of the mischievous propensities of a particular animal kept by him does not enter into a work on the law of negligence, for if knowledge is shown it is no defence to show that every care was taken. When once knowledge is shown, the owner of the animal is subject to the rule with respect to savage animals, and keeps such an animal at his peril.

Neither is it within the scope of the present work to deal with questions of trespass. It is sufficient to observe here that a man is liable to an action for trespass if he does not prevent his animals from trespassing; and it is no answer to such an action that he took the best possible care to prevent the trespass (*c*). How far he is liable for a trespass by smaller animals, such as dogs, cats, fowls, &c., seems to be very doubtful (*d*). It should seem that he would be liable for the trespass if there were really any damage done (*e*), and if not liable in an action for trespass, at all events he would be liable in an action for negligence if, knowing that

(*a*) *May v. Burdett*, 9 Q. B. 101.

(*b*) *Scribner v. Kelly*, 38 Barb. 14.

(*c*) *Ante*, p. 39.

(*d*) See *Reed v. Edwards*, 17 C. B. N. S. 245; 34 L. J. C. P. 31.

(*e*) See "Add. on Torts," pp. 110, 268, 301, 5th ed., by L. W. Cave, Q.C. See as to the necessity of ap-

preciable damage, *Smith v. Thackerah*, 35 L. J. C. P. 276; L. R. 1 C. P. 564, or more accurately perhaps, "appreciable injury to a right," see 1 Sm. L. C., 8th ed., p. 308; and see remarks of Taunton, J., in *Marzetti v. Williams*, 1 B. & Ad. 426.

the animals were in the habit of committing damage, he took no care to prevent them, and they had really done substantial injury.

So far as the trespass is occasioned by negligently omitting to repair or keep up fences the subject will be found discussed in the section on the duties of owners of property (*f*). Sometimes where there has been in fact a trespass, yet the thing complained of is the *neglect* of control over the animal, and this of course is within the scope of the present work and the present section.

Where the injury done is the natural consequence of the negligent control the owner is liable, without any proof of *scienter*; for persons must be taken to know the nature and habits of animal which they undertake to control (*g*), and ought to exercise such ordinary care as is proper for their control. But where the damage is such as it is not the nature of the animal ordinarily to commit, it lies upon the party damaged to show that the owner knew the particular animal was capable of the act complained of, and when he has shown that he need not prove negligence (*h*).

It is said that a person driving cattle through a street is bound to take the utmost care to avoid doing any injury to the public (*i*). It seems that surrounding circumstances being fraught with more danger, more care must be used. There is a danger both from the nature of the animals and from the crowded street (*j*).

But these cases are not those of "savage" animals, but only of *quasi* savage animals, which we shall speak of presently.

The mere keeping of infectious animals, even where the animals belonging to another person are thereby endangered,

(*f*) *Ante*, Ch. II., p. 37.

(*g*) *e.g.*, cows or sheep eating crops. See Shearman, ss. 188, 190.

(*h*) *Cook v. Waring*, 2 H. & C. 332 (scabby sheep); *Read v. Edwardes*,

17 C. B. N. S. 260; 34 L. J. C. P. 31 (dog accustomed to hunt game).

(*i*) *Ficken v. Jones*, 28 Cal. 618.

(*j*) As to this see *post*, Ch., III., s. 3.

is not, it seems, a negligent act of itself (*k*), but it may be so (*l*).

The question how far the owner of an animal not known to be vicious, and which cannot naturally be presumed to be so, but which escapes from control and injures another, is liable for such injury, is not by any means free from difficulty. The difficulties, however, mainly arise upon the question of contributory negligence, and this subject will be more conveniently dealt with in a separate chapter: see Chapter V. If the animal is properly under his control, and he is exercising ordinary care, but, nevertheless, the animal does an injury, the owner is not liable (*m*); but if he negligently omits to exercise ordinary care to control it, he is liable for such injury as is the proximate result of such negligence (*n*).

As to cattle straying upon railroads, see Ch. II., *ante*, p. 39.

In the case of dogs the law appears to have dealt somewhat tenderly with their owners, and to have held that they are not liable unless knowledge of the vice of the particular dog is brought home to them. And, indeed, in several cases at Nisi Prius it seems to have been allowed that a man may keep a dog which he knows to be savage for the purposes of defending his house, and is not liable for any injury such dog may do, provided he does not keep him negligently (*o*).

The law on this point being found to be very unsatisfactory, especially in regard to the protection of sheep and cattle (*p*), the 28 & 29 Vict. c. 60 (*q*) was passed, rendering

(*k*) Shearman, s. 193. See Contagious Diseases (Animals) Act, 41 & 42 Vict. c. 74.

(*l*) See Cook v. Waring, *supra*.

(*m*) Shearman, 194. Holmes v. Mather, L. R. 10 Ex. 261 (horses running away, frightened by bark of dog).

(*n*) See Ch. I., p. 13; and see *post*, Ch. V., Contributory Negligence.

(*o*) Brook v. Copeland, 1 Esp. 302; Sarch v. Blackburn, 4 C. & P. 300;

Curtis v. Mills, 5 C. & P. 489.

(*p*) This has been held to apply to horses, Wright v. Pearson, L. R. 4 Q. B. 582; 38 L. J. Q. B. 312, and was ruled by Mellor, J., to apply to horses in harness. Ed. And the word "cattle," in another Act, has been held to apply to pigs, Childs v. Hearn, 43 L. J. Ex. 100.

(*q*) 26 & 27 Vict. c. 100 is a similar Act for Scotland.

proof of the *scienter* unnecessary where dogs have injured such animals (*r*), and the owner of a dog doing such injury is now made liable by the statute, without any proof of negligence.

With regard, however, to some animals, which although not "savage" nor yet "domestic," yet are apt frequently at certain times and places to be dangerous, we think that they must be classed in the same category with dangerous goods, and that something more than ordinary care must be exercised with respect to them (*s*).

"Where two or more animals belonging to different persons unite in committing an injury, the owners cannot at common law be made jointly liable for the acts of all the animals thus acting together, but each owner is separately liable for so much only of the damage as was done by his animal" (*t*).

SECTION IV.

Neglect of Duties of Owners or Controllers of Highways.

The reader of the present treatise must be referred to works specially written to illustrate the general law of highways for definitions of "highway," and of "nuisances" and "non-repair," and for the various modes of enforcing the right of user by the public.

(*r*) It is submitted that in all cases the owner of dogs, and of other animals not ordinarily savage, should be liable for negligence and for that only, such negligence depending upon the whole circumstances of the case, and amongst others of knowledge of vice by the owner. As the law is at present, persons escape liability from the difficulty of *proof of scienter*, and on the other hand it is hard that the

greatest amount of care will not excuse after knowledge is proved, or in cases under the statute without knowledge being proved. The Scotch Act, 26 & 27 Vict. c. 100, did not contain the words "or that the injury."

(*s*) See *post*, Ch. III., s. 3.

(*t*) Shearman, s. 198. The jury may adopt any reasonable method of assessing the damages.

It is not proposed in the present treatise to illustrate the various liabilities which the statute law has cast upon different towns or corporations with respect to their streets and highways (*a*). Each town has its own statutes and bye-laws, and, as in the case of particular contracts, the question is generally one of construction. Nor is it intended to discuss the powers and liabilities of public authorities with respect to the streets or highways placed under their control by the Public Health Act of 1875, or by the Highway Acts. Such a discussion would lead us too far a-field; and the reader who desires more particular information upon these points must seek for it in books more especially devoted to those topics. All that can be done in the present treatise is to point out the general principles of the law applicable to the subject.

With respect to the law of nuisance, as has been already stated (*b*), it must be remembered that a private action arises only where the act which is a nuisance to the public has caused a special and particular damage to the party himself (*c*); and further, that in order to found an action for negligence there must, as we have seen (*d*), be a duty which has been neglected (*e*) and an equality of rights (*f*).

No action could be maintained at common law for an injury arising from the non-repair of a highway (*g*). But a duty may be cast upon a corporation to repair the highway, and if that is clearly done they will be answerable in an action for negligence (*h*); but the whole question in such cases depends upon whether the particular section of the Act

(*a*) The general rule as regards corporations will be found *post*, Ch. III., s. 7, title "Corporations."

(*b*) See Ch. II., s. 2, Real Property.

(*c*) *Duncan v. Thwaites*, 3 B. & C. 556; *Iveson v. Moore*, 1 Ld. Raym. 486; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316.

(*d*) *Ante*, p. 1.

(*e*) *Collis v. Selden*, L. R. 3 C. P. 495.

(*f*) See *ante*, p. 3.

(*g*) The reason for this has been variously stated. *Gibbs v. Mersey Docks*, *per* Blackburn, J.; L. R. 1 H. L. p. 111; 35 L. J. Ex. 225; *Young v. Davis*, 7 H. & N. 760; 2 H. & C. 197; *Parsons v. St. Matthew*, Bethnal Green, L. R. 3 C. P. 56; 37 L. J. C. P. 62; *Gibson v. Preston* (Mayor of), L. R. 5 Q. B. 222; 39 L. J. Q. B. 131.

(*h*) *Hartnell v. Ryde Commissioners*, 4 B. & S. 361; 33 L. J. Q. B. 39. See *Gibson v. Preston*, *supra*.

relied upon by the party injured does or does not impose a duty to repair, and this is a matter of construction.

This duty, if imposed upon a corporation, will probably extend itself not merely to the absolute repair of the road, but to the protecting of persons from dangers, which are as it were attached to the ordinary user of the highway, and into which people would naturally run if they were not protected from such dangers (*i*). It must be borne in mind that corporations executing statutory powers are bound to use more than ordinary care (*k*).

Where there is an unauthorised interference or obstruction to an highway, an action would lie for special injury thereby (*l*); but these would not be actions for negligence. So, also, where there is an unreasonable user of a highway, that is an interference or obstruction, and the rights are not equal, for the party has no right whatever to such user; but if the user is in itself, if care is taken, reasonable, the rights of the parties are equal, *i.e.*, each has a right to the reasonable user of the highway, and their only liability arises when they omit to take care. Thus, in cases of unloading waggons by the side of the highway, the right to do so is subordinate to the right of passage along the highway by the public, and if the right of passage is substantially interfered with it is a nuisance, and the question of negligence does not arise (*m*).

So, also, where there is a power or license given to interfere with a highway, that power or licence must be strictly pursued, and if not, the interference being a different thing to that which is permitted or ordered, is a public nuisance (*n*), and the question of negligence does not arise.

But frequently, in the very act of doing repairs or other

(*i*) Shearman, s. 389, *et seq.* The American cases are very numerous upon this subject; and it should be remarked that where the dangers are greater there is the greater duty to take care.

(*k*) Ch. III., s. 7, Corporations.

(*l*) *Harris v. Mobbs*, L. R. 3 Ex. D. 262.

(*m*) *Rex v. Russell*, 6 East 427; *Rex v. Cross*, 3 Camp. 226.

(*n*) See Shearman, s. 364. See *Reg. v. United Telegraph Co.*, 9 Cox CC. 174; 3 F. & F. 73; and *Attorney-General v. Ely, &c., Ry. Co.*, L. R. 6 Eq. 106; 4 Ch. 194; 38 L. J. Ch. 258; *Shearman*, 372; *Buxton v. N. E. Ry. Co.*, L. R. 3 Q. B. 549; 37 L. J. Q. B. 298.

necessary work in or near the highway, the highway has to be obstructed and the public put in some danger. It then becomes the duty of the person so lawfully interfering with the highway to see that ordinary and reasonable care is taken in the mode of interference, and to provide, if necessary, proper safeguards, bridges, scaffoldings, &c., and to maintain them as long as they are required (o). So if persons have by Act of Parliament a right to take up the pavement, they must be careful lest in relaying stones they are left so as to admit of a prudent and careful person supposing them to be safe when they are not (p).

And where a power or license is given to interfere with a highway it is an implied condition that at least ordinary care shall be taken (q); and where privileges are bestowed upon corporations with such powers, something more than ordinary care is, as we shall see, demanded. Where the plan or mode of executing the work is not pointed out by the statute, that plan is to be adopted which is best calculated to subserve the object of the work, and care must be taken in its adoption (r).

How far corporations as distinguished from individuals are protected by showing that they have carefully selected the persons best competent to give them a plan, or are like individuals bound to see to the execution of it, see Ch. III., s. 6, *post*, Corporations.

So, also, a corporation is liable for the negligence of another person whom it has authorised to do work upon a highway for his own benefit, but over which the corporation ought to exercise control (s), as in the case of a private occupier authorised to interfere with the drains communicating with the main sewers (t).

(o) See *Shearman*, ss. 358, 376.

(p) *Drew v. New River Co.*, 6 C. & P. 754.

(q) *Brine v. Great Western Ry. Co.*, 2 B. & S. 402; *Jones v. Bird*, 5 B. & Ald. 837; *Whitehouse v. Fellowes*, 10 C. B. N. S. 765; *Brownlow v. Met. Board*, 16 C. B. N. S. 546. This comes

within the law relating to corporations acting under statutory powers, Ch. III., s. 7.

(r) *Shearman*, ss. 372, 373.

(s) *Shearman*, s. 400.

(t) See cases cited by *Shearman*, s. 400. As to notice of defect to corporation, see Ch. III., s. 7, Corporations.

Every one who lawfully interferes with a public highway so as to render it dangerous to passengers is bound to guard against such danger, and if he does not he is liable to an action for negligence (*u*).

And it can scarcely be doubted that where a person unlawfully places upon a highway an instrument or thing which is dangerous to passers by, he is bound to take all necessary precaution, and is answerable for the consequences of not doing so in an action of tort, and even if he do so lawfully he is bound to take care; and is liable to an action of negligence if he omits to do so (*v*).

The owner of land adjoining an highway is bound as we have seen not to interfere with the safety of persons using the highway (*w*); and in repairing or erecting premises where it is lawful to encroach during the progress of the work, such encroachment must be made with ordinary care, and any danger guarded against (*x*).

Corporations or persons undertaking to manage highways are not insurers against latent defects, they are only bound to take care (*y*), and as far as their statutory duties are concerned, something more than ordinary care (*z*).

The omission of suitable railings or walls to a bridge is a negligent act, and cannot be excused by showing that such barriers might increase the liability of the bridge to destruction by floods (*a*).

Railway bridges over highways should be kept in proper repair (*b*).

Drawbridges should be properly constructed, and be furnished

(*u*) *Whiteley v. Pepper*, L. R. 2 Q. B. D. 276; 46 L. J. Q. B. 436; and if there are two modes of doing work on the highway to choose the least dangerous: *Cleveland v. Spier*, 16 C. B. N. S. 399.

(*v*) *Clark v. Chambers*, 47 L. J. 427; L. R. 3 Q. B. D. 327 (barrier with spikes); *Harris v. Mobbs*, L. R. 3 Ex. Div. 268 (van and engine by side of road frightened horse in trap).

(*w*) *Sees. 2, ante*, Real Property, p. 31.

(*x*) *Shearman*, s. 366.

(*y*) *Shearman*, s. 398.

(*z*) *See post*, Ch. III., s. 7, Corporations performing Statutory Duties.

(*a*) *Shearman*, s. 253.

(*b*) *Kearney v. L., B. & S. C. Ry.*, L. R. 6 Q. B. 759; 40 L. J. Q. B. 285 (stone fell from bridge on passer-by). *See Grote v. Chester, &c., Ry. Co.*, 2 Exch. 251.

with proper machinery for raising the same upon the passing of vessels, and should be protected by proper barriers, or lights, or other warnings for the advantage of passengers across the bridge, and for negligence in this respect the proprietors will be liable (*c*); probably for something less than ordinary negligence. So long as they keep the bridge open and take tolls, so long are they liable for negligence, even although they give notice to travellers of the insecurity of the bridge (*d*).

It is said that the destruction of a bridge by an extraordinary flood raises no presumption of negligence, but where it is subject to floods it must be so constructed as to resist them (*e*).

Corporations or private persons who take tolls under Acts of Parliament for the use of canals are bound, as we think, to exercise something more than ordinary care in the management of such property (*f*). But they are not insurers, and are not liable for injuries arising from circumstances of which they had no knowledge (*g*).

So, also, a canal company must see that its canal, docks, locks, wharves and bridges are properly constructed and managed (*h*).

As to injuries to adjoining lands by reason of overflow or bursting of banks, the proprietors are, at the least, liable for negligence (*i*).

A canal towing path is a public highway only for the purposes of a towing path and not for the general public (*k*); and a canal company is not bound to fence or repair it as against the general public, and an action of negligence will not lie for their neglect to fence or repair (*l*).

(*c*) Shearman, s. 250.

(*d*) Shearman, s. 250.

(*e*) Shearman, s. 250, note 3.

(*f*) *Lancaster Canal Co. v. Parnaby*, 11 Ad. & El. 223 (boat sunk in canal; defendants had notice of obstruction). See Corporation, *post*, Ch. III., s. 7.

(*g*) *Exchange Fire Ins. Co. v. Delaware Canal Co.*, 10 Bosw. 180.

(*h*) *Attorney-General v. Bradford Navigation Co.*, 35 L. J. Ch. 619 (this was a case of nuisance); *Gautret v.*

Egerton, L. R. 2 C. P. 371; *Manley v. St. Helen's Canal Co.*, 2 H. & N. 840; 27 L. J. Ex. 164 (swing bridges).

(*i*) *Whitehouse v. Birmingham Canal*, 27 L. J. Ex. 25. If indeed they are not bound to keep it at their peril: see *ante*, p. 34.

(*k*) *R. v. Severn Ry. Co.*, 2 B. & Ald. 646.

(*l*) *Binks v. S. Y. Ry. Co.*, 3 B. & S. 244; 32 L. J. Q. B. 26.

SECTION V.

*Neglect of Duties of Corporations (not performing
Statutory Duties).*

The duties of corporations are in general prescribed to them by the charter or statute of incorporation, and the performance of those duties which are imperative upon them by reason of such charter or statute are such as require more than ordinary care, and will be found fully discussed in Ch. III., s. 7, *post*. Those duties also which devolve upon them by reason of their having invited persons upon their premises, or taken tolls from them for the use of their property, require something more than ordinary care in their performance, and will be found in the same portion of this treatise.

We shall here only shortly state that corporations sometimes undertake duties which they are not bound to perform by reason of any statute or charter, but which are either merely indicated for the exercise of their discretion or are undertaken by them in a purely voluntary manner. With respect to these duties they are not bound to undertake them (*m*), and if they do so they are only bound to exercise ordinary care (*n*).

Like other persons corporations are liable for the negligent use of their property, even where no statutory duty is broken (*o*).

It seems that a corporation is not answerable for the want

(*m*) *Wilson v. Preston* (Mayor of), L. R. 5 Q. B. 218.

(*n*) Where turnpike trustees altered an open ditch into a closed one and made insufficient gratings, so that the rain washed over the road and injured

a mine, it was held they were liable in an action of negligence for such injury: *Whitehouse v. Fellowes*, 30 L. J. C. P. 305; 10 C. B. N. S. 765.

(*o*) See "*Wharton on Negligence*," s. 251.

of adequate administrative ordinances, nor for the manner in which its ordinances are carried out (*p*).

Where there is no specific duty imposed by law upon the corporation it is not sufficient that it has not done something which would, if done, have prevented injury, but it must be shown either that it has directly by negligence caused the injury or permitted it with notice (*q*), or permitted another to cause it (*r*). In fact, as has been before said, a duty must be shown and a breach of the duty (*s*).

The act which is being done, and of which negligence is alleged against the corporation, must be one which is within the powers or duties of the corporation, and must not be *ultra vires* (*t*). If it is *ultra vires* it is a wrong of a different nature to those treated of in this work.

A corporation, like a private person, can be affected with knowledge of the dangerous or defective state of things under their control (*u*).

SECTION VI.

Duties of Masters.

(1.) *Breach of Duty to Servants.*

(2.) *Breach of Duty to Others.*

It need scarcely be said that whether the neglect of duty is that of a master towards a servant, or towards others through his servants, or of servants towards others in the

(*p*) Shearman, s. 153.

(*q*) Shearman, ss. 147, 148.

(*r*) Shearman, s. 147.

(*s*) *Ante*, p. 1.

(*t*) *Poulton v. L. & S. W. Ry. Co.*,
L. R. 2 Q. B. 534; 36 L. J. Q. B. 294;
see "*Brice on Ultra Vires*," p. 246.

(*u*) *Penhallow v. Mersey Docks*, 30
L. J. Ex. 329, Ex. Ch., *per* Blackburn,
J.; see S. C. on appeal, L. R. 1 H. L.
93; 35 L. J. Ex. 225; *Stiles v. Cardiff*
Steam Nav. Co., 33 L. J. Q. B.
3110.

same employment, it is important to consider whether the parties really occupy the relations of master and servant or some other relations, such as those of employer and contractor, bailor and bailee, &c. (*a*). A principal is responsible for the acts of his agent done within the scope of his authority upon the general principle *Qui facit per alium facit per se*. As soon as it is shown that the person doing the act complained of was an agent, and was doing the act in pursuance of the authority of another, that other may be sued for the damages occasioned by the negligent act of the agent.

SECTION VI.—SUB-SECTION I.

(1.) *Breach of Duty to Servants.*

To make a master liable for negligence towards his servant there must (in the absence of any special contract or enactment making the master liable) be either personal negligence upon his part (*b*), or negligence by his representative (*c*) or colleague (*d*). He may, however, be guilty of personal negligence not only in relation to the act itself which causes the injury, but he may be less directly but sufficiently connected with the injury by some previous negligence of his

(*a*) See *Fowler v. Lock*, 41 L. J. C. P. 99; L. R. 7 C. P. 272 (bailor and bailee); *Venables v. Smith*, 46 L. J. Q. B. 470; L. R. 2 Q. B. D. 279; (proprietor and driver of conveyance—master and servant); *Steel v. Lester*, 47 L. J. 43 (ship-owner and captain, former retaining share—master and servant); *Fraser v. Marsh*, 13 East 238 (not retaining share; demise of ship—not master and servant). See also *post*, pp. 62, 67, 68.

(*b*) *Ormond v. Holland*, E. B. & E.

102; *Brydon v. Stewart*, 2 Macq. H. L. 30; *Roberts v. Smith*, 2 H. & N. 212; *Ashworth v. Stanwix*, 1 B. & S. 437; *Brown v. Accrington Cotton Co.*, 3 H. & C. 511 (buildings originally built in a negligent manner).

(*c*) *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Murphy v. Smith*, 19 C. B. N. S. 361.

(*d*) *Mellors v. Shaw*, 30 L. J. Q. B. 333; *Ashworth v. Stanwix*, *ib.* 183 (co-owners of mines).

own, as by negligently hiring incompetent servants, or not providing proper material for the work which his servants have to perform. Thus, he will be held liable to an action by his servant for negligence in selecting his servants (*e*), or, it seems, in retaining them after notice of their incompetence (*f*). He is bound to take reasonable care in the selection of competent persons to do his work (*g*), and to take reasonable care to furnish them with adequate materials and resources for the work (*h*). He does not, however, warrant the competency of his servants (*i*).

If the master has given orders to the proper servants such as would, if obeyed, prevent any harm arising from the use of defective materials, he is not liable (*k*) upon the ground that the servant is no longer a servant when he is disobeying positive orders.

The master does not by a simple hiring contract with or

(*e*) *Webb v. Tarrant*, 18 C. B. 787.

(*f*) *Weger v. Pennsylvania Ry. Co.*, 55 Penn. St. 460.

(*g*) The mere fact of incompetency is not sufficient, though it may be some, evidence that the master did not take reasonable care in selecting the servant: see *Edwards v. L. & B. Ry. Co.*, 4 F. & F. 531.

(*h*) *Per* Lord Cairns, L.C., in *Wilson v. Merry*, L. R. 1 S. & D. App. 326 (scaffolding in pit obstructing ventilation); *Allen v. New Gas Co.*, L. R. 1 Ex. Div. 251; 45 L. J. Ex. 668 (falling of gates); *Brydon v. Stewart*, 2 Macq. H. L. 30 (workmen coming up coal pit); *Williams v. Clough*, 3 H. & N. 258 (defect in a ladder); *Mellors v. Shaw*, 1 B. & S. 437 (shaft of a mine); *Brydon v. Stewart*, 2 Macq. H. L. 30, *supra*; *Ogden v. Rummens*, 3 F. & F. 751 (defendant employed a man to shore up an arch; held, that if defendant had reasonable cause to believe there was danger, and the man had not, defendant was liable; see also *Britton v. Gt. Western Cotton Co.*, L. R. 7

Ex. 130 (wheel-race in engine-house unfenced); *Webb v. Rennie*, 4 F. & F. 608 (pole left in ground an unreasonable time); *Conolly v. Poillon*, 41 Barb. 366 (a man knowing nothing about scaffolding was put by a man who did into hold of a gun-boat to get rubbish from beneath a scaffold; held, he had a right to assume that due care had been taken about the scaffold); *Weens v. Mathieson*, 4 Macq. H. L. 215 (plaintiff at work under cylinder suspended by defendant); but see *Potts v. Plunkett*, 9 Ir. C. L. 290 (landing erected by defendant, but held necessary to show *knowledge*); *Murphy v. Phillips*, 35 L. T. N. S. 477 (chain broke from wear and bad welding; master had not tested it; held, master liable); see also *Allen v. New Gas Co.*, L. R. 1 Ex. D. 251; 45 L. J. Ex. 668 (gates unsafe when shut; held, company not liable).

(*i*) *Per* Cairns, L.C., in *Wilson v. Merry*, *supra*, citing *Tarrant v. Webb*, 25 L. J. C. P. 268.

(*k*) *Durgin v. Munson*, 9 Allen 396; *Smith v. Dowell*, 3 F. & F. 238.

guarantee his servants against all risks (*l*), but he is bound to take reasonable care of his servants, to inform them of extraordinary risks (*m*) and to make rules for safe management (*n*).

A servant may, however, by his conduct waive his common law rights as against his master by entering upon the service upon other terms, either express or implied. With express contracts this work has nothing to do (*o*), but with respect to services given under special circumstances it should be stated that if a servant enters upon or continues in a service after notice or knowledge of danger he must be taken to have accepted the service and the danger too (*p*).

Where a servant has informed his master of defects, it is a question of evidence how far he and his master have agreed to a fresh service upon different terms, with an increase of liability on the master's part or of danger upon the servant's. If the master has expressly or impliedly promised to repair a defect, then if an accident happened while such promise is running the servant can recover (*q*); or if the servant continues in the service in the reasonable expectation that the

(*l*) *Riley v. Barrendale*, 6 H. & N. 446. Thus, it is not sufficient to prove that a machine was badly constructed, but it must be shown that the master employed incompetent persons to make it: *Potts v. Port Carlisle Dock Co.*, 2 L. T. N. S. 283.

(*m*) *Davies v. England*, 10 Jur. N. S. 1235 (not informing of danger of cutting diseased meat).

(*n*) *Vose v. L. & Y. Ry. Co.*, 2 H. & N. 728 (shunting railway cars).

(*o*) *Ante*, p. 5.

(*p*) *Frazer v. Pennsylvania Ry. Co.*, 38 Penn. St. 104 (servant aware of habitual negligence of fellow-servant); *Skipper v. Eastern Counties Ry. Co.*, 9 Exch. 223 (had done work without assistance for long time); *Griffiths v. Gidlow*, 3 H. & N. 648 (knew defects in machinery); *Senior v. Ward*, 1 E. & E. 385 (knew rope to coal mine insufficient); *Assop v. Yates*, 2 H. & N.

768 (machine left near hoarding in dangerous position; work voluntarily continued); *Dynen v. Leach*, 26 L. J. Exch. 221 (fall of a weight by slipping of a clip. In this case it was held that as the servant was aware of the danger the master was not responsible, although there was a safer way of doing the work, which was discarded by the master's own orders, *sed quære?*); *Saxton v. Hawkeworth*, 26 L. T. N. S. 851 (engine known to be left unattended revolved too fast and broke a drum); *Woodley v. Metropolitan Ry. Co.*, L. R. 2 Ex. D. 384; 46 L. J. Ex. 521 (plaintiff continued to work near a tunnel unprotected; held, no remedy; jury found negligence in not providing a look-out man).

(*q*) *Paterson v. Wallace*, 1 Macq. H. L. 748; *Clark v. Holmes*, 7 H. & N. 937.

repairs will be effected he can recover (*r*). If the promise is not performed in a reasonable time, and the servant continues in the employment, an inference arises of new terms having been agreed upon, and the servant cannot then recover. The reason of this is said to be (*Clark v. Holmes, supra*) that there is contributory negligence on the part of the servant; but it is suggested in "Shearman on Negligence," s. 97, that the true ground is that the servant has waived the objection and induced the master to suppose that it is waived, or, as we are inclined to say, the servant has renewed the service accepting the risk.

The principles upon which a master is held not to be responsible to his servant for injuries, the risk of which the servant has undertaken (*s*), are very clearly stated by Lord Cranworth (*t*). After stating the liabilities of masters to third persons, his lordship thus proceeds to deal with the master's liability to his servant:—

"But do the same principles apply to the case of a workman injured by the want of care of a fellow-workman (*u*) engaged together in the same work? I think not. *When the workman contracts to do work of any particular sort he knows, or ought to know, to what risks he is exposing himself*; he knows, if such be the nature of the risk, that want of care on the part of a fellow-servant may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He

(*r*) *Holmes v. Worthington*, 2 F. & F. 53, *per* Willes, J.

(*s*) As to who is a "fellow-servant," see *post*, p. 58; as to "common employment," see *post*, p. 60.

(*t*) *Bartonshill Coal Co. v. Reid*, 3 Macq. 282; and the passage is approved of by Cairns, L.C., in *Wilson*

v. Merry, supra. See also *Lovell v. Howell*, L. R. 1 C. P. D. 161; 45 L. J. C. P. 387 (sack of grain on a crane injuring waterman).

(*u*) This is an example of the rule, but not the rule itself: see *Wilson v. Merry*, L. R. 1 Sc. App., p. 332.

cannot say the master need not have engaged in the work at all, for he was party to its being undertaken. Principle, therefore, seems to me opposed to the doctrine that the responsibility of a master for the ill consequences of his servant's carelessness is applicable to the demand made by a fellow-workman in respect of evil resulting from the carelessness of a fellow-workman when engaged in a common work."

It should, however, be remarked that probably, in point of fact, no such reasoning exists in the mind of a person undertaking a service, and that, on the contrary, most servants would be much surprised to learn the real state of the law. It has also been doubted whether the law as it stands at present is not injurious, and is not calculated to induce carelessness in both masters and servants. The master does not care to know what careless acts are done by his servants, and the servants do not care if the master does not. When an accident happens no one is liable, and nobody cares except the unfortunate man who is injured. It is doubted whether there is sufficient reason for departing from the ordinary rule that masters are responsible for the negligence of their servants, but not for acts done out of the course of their employment (*v*).

The rule above laid down by Lord Cranworth only applies to such dangers as the servant might be reasonably aware of (*x*), and even if aware of the danger, yet if he reasonably thought that by using additional caution he could avoid the danger, and if he did use additional and proper caution, the master would, it has been suggested, be still liable (*y*).

(*v*) See *post*, p. 61. Several bills, and among them one by the Attorney-General (Sir John Holker), have been introduced into Parliament, but not passed at present (January, 1880), by which it was proposed, in different ways and degrees, to render a master liable for damages to a servant injured by the negligence of a fellow-servant. The Attorney-General's bill limited

the master's liability to the acts of a servant "in authority."

(*x*) See *Britton v. Gt. Western Cotton Co.*, L. R. 7 Ex. 130; 41 L. J. Ex. 99.

(*y*) *Shearman*, s. 95, citing *Snow v. Housatonic Ry. Co.*, 8 Allen 441; *Mad River Ry. Co. v. Barber*, 5 Ohio St. 541, 565, *per* Bartley, J.

If the master's own negligence is the proximate cause of the injury it is no defence for him to allege that there was contributory negligence in a fellow-servant (z).

A master is not in general liable to his servant for damage resulting from the negligence of a *fellow-servant* in the course of their *common employment* (a).

"Fellow-servants" are those who serve the same master and are under his control. One may be under the control of the other (b), but if they are both under the master's control they are fellow-servants (c).

(z) *Cayzer v. Taylor*, 10 Gray. 274; see *post*, Ch. VI., "Contributory Negligence."

(a) *Wigmore v. Jay*, 5 Exch. 354; *Hutchinson v. York, Newcastle & Berwick Ry. Co.*, 5 Exch. 343; *Vose v. Lancashire & Yorks. Ry.*, *supra*.

(b) *Searle v. Lindsay*, 11 C. B. N. S. 429; *Feltham v. England*, L. R. 2 Q. B. 33; 36 L. J. Q. B. 14. It seems that in Kentucky, Ohio, and Georgia the decisions have been to the contrary effect, and it has been held that if a servant is so under the control of another servant that he is unable to take precautions against that servant's negligence, they are not fellow-servants: *Shearman*, s. 100, note 4, citing *Cleveland Ry. Co. v. Keary*, 3 Ohio St. 201; *Little Miami Ry. Co. v. Stevens*, 20 Ohio 415; *Cooper v. Mullins*, 30 Geo. 146, and there would seem to be very great justice in this view. Somewhat the same view seems to have been taken in Scotland: *M'Auley v. Brownlie*, 22 Dunlop 975; *Somerville v. Gray*, 1 M'Pherson, 768; but such is clearly not the law in England: see *Wilson v. Merry*, *supra*; *Feltham v. England*, *supra*.

(c) The following persons have been held to be fellow-servants:—*Wilson v. Merry*, L. R. 1 S. & D. 326 (a servant who has left the service, and has during service done a negligent act, is fellow-servant to one who comes into the service afterwards); *Feltham v. England*, Law Rep. 2 Q. B. 32; 36 L. J. Q. B. 14 (workman under con-

trol of foreman); *Searle v. Lindsay*, 11 C. B. N. S. 429 (third engineer under control of first engineer in ship); *Sherman v. Rochester Ry. Co.*, 17 N. Y. 153 (brakesman and engineer of train); *Wiggett v. Fox*, 11 Exch. 832 (workman under sub-contractor engaged in doing by piecework particular portions of common work, viz., building tower at Crystal Palace); *Charles v. Taylor*, L. R. 3 C. P. D. 492 (man unloading coals from barge, and man lifting barrels); *Potter v. Faulkner*, 1 B. & S. 100 (volunteer assistant is a fellow-servant, although the master would not be liable to third parties for his negligence as servant); see also *Degg v. Midland Ry. Co.*, 1 H. & N. 773; *Cleveland v. Spier*, 16 C. B. N. S. 399 (mere passer-by asked to help by workman is not a volunteer assistant; if he is not a mere volunteer acting for his own benefit, but is asked by the master to assist, the master is liable to third parties); *Wright v. London & N. W. Ry. Co.*, 45 L. J. Q. B. 570; L. R. 1 Q. B. D. 252 (unloading a heifer); *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 62; 44 L. J. Q. B. 25 (certificated manager of mine and miner); *Lovell v. Howell*, *supra* (waterman and servants at granary with sack on a crane); *Conway v. Belfast & Northern Ry. Co.*, 11 Ir. R. C. L. 345 (general traffic manager and milesman); *Lovegrove v. London, Brighton & S. C. Ry.*, 16 C. B. N. S. 669; 33 L. J. C. P. 329 (labourer

The law does not permit a master so to delegate his authority to another as to relieve himself of all liability for negligence; and it seems that it is the law in America that if he delegates to another his power of selecting servants, he ought still to be held liable for negligence in such selection (*d*). But Lord Chelmsford, in delivering judgment in *Wilson v. Merry* (*e*), said that to direct a jury that if a foreman "had the complete power of engaging and dismissing workmen as he pleased, and the ventilation process was entirely left to him without the direction or control of the defenders, he was a superintendent and not a fellow-workman with the deceased," would be a misdirection; and Lord Cairns said, "the respondents had delegated no power, authority, or duty except in the sense in which a master who employs a skilled workman to superintend a portion of his business delegates power, authority, and duty to the workman for that purpose . . . and the learned judge ought not, as I think, to have suggested to the jury that this could be viewed in any other light than as the ordinary employment by the respondents of a sub-manager or foreman. I think the learned judge ought to have told the jury that if they were of opinion

filling trucks with ballast and plate-layers); *Gallagher v. Piper*, *ibid.* (labourer erecting scaffolding and builder's foreman). The following persons have been held not to be fellow-servants:—*Fletcher v. Peto*, 3 F. & F. 368 (servant and contractor; plaintiff contractor to carry guano, servants to pile it at ordinary wages); *Abraham v. Reynolds*, 5 H. & N. 143 (plaintiff, servant of carter, to take bales from defendant's warehouse; defendant's servants let bale fall; parties having a common object, but different interests); *Sawyer v. Rutland Ry. Co.*, 27 Verm. 370; *Smith v. N. Y. & Harlem Ry. Co.*, 19 N. Y. 127 (contract between two companies for joint use of line—servants not fellow-servants); *Warburton v. Gt. Western Ry. Co.*, L. R. 2 Exch. 80; 36 L. J. Ex. 9 (porter of one com-

pany and engine-driver of another; station used in common; held, not in course of common employment or operation under the same master); *Graham v. North-Eastern Ry. Co.*, 18 C. B. N. S. 229 (signalman of one company and driver of another); *Swainson v. North Eastern Ry. Co.*, 47 L. J. 372; L. R. 3 Ex. Div. 341 (signalman of one company and driver of another); *Murphy v. Smith*, 19 C. B. N. S. (boy directed by person to stir explosive substance; question whether such person was "vice-principal" or fellow-servant; held, no evidence of being vice-principal); *Paterson v. Wallace*, 1 Macq. H. L. 748 (agent in charge of mine).

(*d*) *Shearman*, ss. 102—105, citing *Grizzle v. Frost*, 8 F. & F. 622.

(*e*) *Wilson v. Merry*, L. R. 1 S. & D. 326, 338.

that the respondents exercised due care in selecting proper and competent persons for the work, and furnished them with suitable means and resources to accomplish the work, the respondents were not liable" (*f*). It seemed to be agreed in this case that the terms "fellow-workman or servant," "collaborateur," "foreman," or "manager" are misleading, and it seems to be the result of this case, that when the master has provided proper means and resources for the work he is not responsible for the acts of those in his employment injuring one another, whatever their particular grade or denomination may be, provided they are engaged in the common employment.

In order to exonerate the master, the servant who does the injury must not only be the "fellow-servant" of the servant injured, but the two servants must be in the "same common employment" (*g*). "There may be some nicety and difficulty

(*f*) P. 333.

(*g*) The following persons have been held to be engaged in a common employment:—*Waller v. S. E. Ry. Co.*, 2 H. & C. 102; *Lovegrove v. L. B. & S. C. Ry. Co.*, 16 C. B. N. S. 669 (guard of train and platelayer); *Russel v. Hudson River Co.*, 17 N. Y. 134 (assistant brakeman and engine-driver); *Farwell v. Boston Ry. Co.*, 4 Metc. 49 (engine-driver, and engine-driver and guard of another train); *Charles v. Tayler, Walker & Co.*, L. R. 3 C. P. D. 492 (unloader of coals from barge and lifter of barrels); *Bartonsbill Coal Co. v. Reid*, 3 Macq. H. L. 266 (engineer of coal mine above ground and men below); *Hull v. Johnson*, 3 H. & C. 589 (workmen and underlooker in a coal mine); *Morgan v. Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149; 44 L. J. Q. B. 23 (carpenter and porters shifting locomotive); *Boldt v. N. Y. Central Railway Co.*, 13 N. Y. 432; *Ryan v. Cumberland Valley Ry. Co.*, 20 Penn. St. 384; and other cases in America; and *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291 (workmen on line carried free to their work and engine-driver

of trains); *Rourke v. White Moss Colliery Co.*, L. R. 2 C. P. D. 205 (defendants, colliery proprietors, contracted with W., plaintiff's employer, to do work, they to pay engineer and provide steam-power, engineer to be under control of W.; held, plaintiff and engineer in common employment of W.); *Swainson v. North Eastern Ry.*, 37 L. T. N. S. 102 (signalman paid by Great Northern, and engine-driver of North Eastern; salaries a joint-charge on both companies).

The following servants have been held *not* to be engaged in a common employment:—*Turner v. Great Eastern Ry. Co.*, 33 L. T. N. S. 431 (a labourer employed by a contractor to unload trucks, and porters engaged in shunting); *Warburton v. G. W. Ry. Co.*, L. R. 2 Exch. 30; 36 L. J. Ex. 9; *Chicago Ry. v. Gregory*, 58 Ill. 272 (fireman and controller of mail catcher); *Baird v. Pettitt*, 70 Pa. St. 477 (draftsman in engine-house and jobbing carpenter); and see the cases *ante*, where servants have been held not to be fellow-servants, and where, as will be seen upon reading the cases, the distinction between "fellow service"

in peculiar cases in deciding whether a common employment exists; but in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertook, a satisfactory conclusion may be arrived at" (*h*); or, in other words, the question is, did the servant know that the employment of the other servant was one of the terms of their common service? (*i*) Is it "the natural and necessary consequence of the employment which the servant has accepted?" (*k*) If there is one common general object to be attained by the two servants, it is immaterial that the immediate object of their work is different (*l*).

SECTION VI.—SUB-SECTION II.

(2.) *Breach of Duty to Others.*

A master is responsible to other persons besides his own servants for negligence of himself, his deputy, or his servant while employed as such (*m*).

If the servant is not, at the time when he commits an injurious act, engaged in pursuing his master's employment, but is pursuing his own private ends, the master is not liable for his servant's acts (*n*). This is the rule with respect to all wrongful acts, whether negligent or not.

and "common employment" is not always maintained. See note (*r*), *ante*, p. 57, as to proposed alteration in the law.

(*h*) *Per* Lord Chelmsford, *Bartons-hill Coal Co. v. McGuire*, 3 Macq. H. L. 300, 308.

(*i*) *Feltham v. England*, L. R. 2 Q. B. 36; 36 L. J. Q. B. 14.

(*k*) *Morgan v. Vale of Neath*, L. R. 1 Q. B. 149; 44 L. J. Q. B. 23.

(*l*) *Charles v. Taylor*, L. R. 3 C. P. D. 492.

(*m*) *Brucker v. Fromont*, 6 T. R. 659.

(*n*) *Mitchell v. Crassweller*, 13 C. B. 237; *Storey v. Ashton*, L. R. 4 Q. B. 476; 38 L. J. Q. B. 223 (driver not putting up horse, but driving off on own account); see, however, *Heath v. Wilson*, 2 M. & Rob. 181; and also see *Joel v. Morison*, 6 C. & P. 501, where a servant made a slight detour. It would be a question for the jury whether the servant was substantially engaged upon his mas-

If the master has given the servant cause to believe that a certain act will be within the course of his employment, or if the act is such a one as servants employed in the same capacity usually perform as part of their duty, then it is to be considered as done in the course of the employment, and if it is negligently or wrongfully performed, the master will be liable. Thus, where servants of companies have authority to remove persons misbehaving themselves upon the premises, the companies have frequently been held liable for the negligent or otherwise wrongful act of their servants in the course of the performance of their duty in this respect (*o*).

It has been said that even where an act is within the scope of the servant's employment, yet if it is done for the purpose of performing an act beyond the scope of the employment the master will not be liable. Thus, where a servant's duty was to light fires, but she lit one for the purpose of cleaning the chimney, with which she had nothing to do, it was held that her master was not liable (*p*). Such cases as these must be of somewhat rare occurrence. The case cited scarcely seems to have come within the rule, as it probably was within the

ter's business or his own. See also *Rayner v. Mitchell*, L. R. 2 C. P. D. 357 (servant of brewer returning with empty casks, not in employment). Where, upon the other hand, the servant was going on his own business in a gig, but undertook some business for his master, in the performance of which he ran against plaintiff's horse, the master was held liable: *Patten v. Rea*, 2 C. B. N. S. 606; *Venables v. Smith*, L. R. 2 Q. B. D. 279; 46 L. J. Q. B. 470 (cab-driver returning home still in employment); *Williams v. Jones*, 33 L. J. Ex. 297; 3 H. & C. 602, in Ex. Ch. (carpenter smoking a pipe set fire to a shed; held, not in course of employment); *Lunn v. L. & N. W. Ry. Co.*, 35 L. J. Q. B. 105; L. R. 1 Q. B. 277 (watchman at level crossing exercising discretion as to passage of a cart); *Weldon v. New York & Harlem Ry. Co.*, 5 Bosw.

576 (defendant's servant mischievously struck horses in charge of another servant); *Satterlee v. Groot*, 1 Wend. 273 (a servant being sent for goods of A., brought also goods of B., and embezzled A.'s goods; master not liable).

(*o*) *Seymour v. Greenwood*, 7 H. & N. 356; 30 L. J. Ex. 327 (assault—guards of omnibusses); *Meyer v. Second Avenue Ry. Co.*, 8 Bosw. 305 (driver of tramway); *Sandford v. Eighth Avenue Ry. Co.*, 42 Penn. St. 365 (do.); *Bayley v. Man., Shef. & Lin. Ry. Co.*, L. R. 8 C. P. 148; 42 L. J. C. P. 78 (assault—porter pulling passenger back from train in motion); *Moore v. Met. Ry. Co.*, L. R. 8 Q. B. 36; 42 L. J. Q. B. 23 (false imprisonment—passenger not paying proper fare, given in custody).

(*p*) *Mackenzie v. McLeod*, 10 Bingh. 385.

scope of the servant's duties to clean the chimneys, if not to sweep them. But, however that may be, a servant cannot properly be said to be performing his ordinary duties at the same time that he is pursuing some purpose differing from his duties. The whole question is, is he performing his ordinary duty, or is he doing something differing therefrom? and this (subject to an explanation from the judge as to how far mere license or ordinary practice may be evidence of what the ordinary duty is) is a question for the jury.

It is no defence to allege that the servant acted improperly, or contrary to orders, if he was acting in the course of his employment (g); nor even that he was acting illegally (r).

It has also frequently been held that if the servant, although engaged all the while in the ordinary course of his employment, does some wanton act, the master is not liable; but the contrary has also been held in many cases. The test is, whether the wanton act was done in the course of the employment or not, although the judgments of the courts do not always apply the test accurately (s); and, indeed, it must

(g) *Limpus v. London Omnibus Co.*, 1 H. & C. 526; 32 L. J. Ex. 34 (omnibusses racing).

(r) See same case, *per* Crompton, J.

(s) *Vanderbuilt v. Richmond Turnpike Co.*, 2 N. Y. 479. (The captain of a vessel, sailing in his proper course, wantonly ran down a vessel. The master was held not liable, no doubt, because it was no part of his business to run down the vessel, but it was his ordinary duty to steer clear of it. He was distinctly pursuing his own private ends.) *Illinois Central Ry. Co. v. Downey*, 18 Ill. 259 (defendant's servants (*wantonly*) ran a train of cars over the plaintiff's team, and the master was not liable). *Limpus v. London Omnibus Co.*, *supra*, shows clearly the nature of the true test. Mr. Justice Wightman, who differed from the rest of the Court, did so upon the ground that racing with the rival omnibus was not, as a matter

of fact, in the course of the servant's duty. A servant, while driving his master's coach, got entangled with plaintiff's, and struck plaintiff's horses. It was held that if he struck them wantonly the master was not liable: *Croft v. Alison*, 4 B. & Ald. 590; and see *McManus v. Crickett*, 1 East 106. *Seymour v. Greenwood*, 30 L. J. Ex. 327; 7 H. & N. 350; see *Bayley v. Manchester Ry.*, *supra* (a-sault—a conductor of an omnibus violently and wantonly dragged a man out of the omnibus for being drunk; it was held that the act was in the course of the employment, and the master was liable). *Ward v. Gen. Omnibus Co.*, 42 L. J. C. P. 265 (negligence—question for the jury, whether an omnibus conductor struck a blow with his whip out of private spite or in furtherance of his master's business); *North v. Smith*, 10 C. B. N. S. 572 (negligence—the defendant's groom struck his spurs into horse just as he

always be difficult to do so. If the act done is one which is plainly in the course of employment, though the real motive is personal spite, the master is not exonerated, as it would be obviously unfair to the injured party to start such a defence upon him, and, of the two innocent parties (the master and third party), it is more reasonable that the master should suffer (*t*).

It should be borne in mind that where the act is intentional the question of negligence does not arise (*u*); yet the master may be liable in an action of tort (other than negligence) if such intentional act was within the scope of the employment. Generally, of course, if the servant did an intentional wrong it would be without the scope of his employment, and the master would not be liable.

It is somewhat doubtful what is the meaning of an act being "wanton." If all that is meant is that the act is "very negligent" (*x*) the master is liable for *negligence*, if it is within the scope of the employment; and if what is meant is that it is "intentional," then the master is liable for *tort* (other than negligence), if it is within the scope of the employment. If the act is not within the scope of the employment the master is not liable. So that the master is liable in some form of action for all wrongful acts done within the scope of the employment, but if the act is intentional and within the scope of the employment, the form of the action is *tort* (other than negligence), but if it is unintentional, *i.e.*, negligent, the form of the action is negligence.

A difficulty always arises in determining whether the act done was in the course of employment, for the mere fact of the negligence is itself an indication of some variation in the

was passing plaintiff's waggon; held, not liable); *Lucas v. Mason*, L. R. 10 Ex. 251; 44 L. J. Ex. 145 (assault—chairman ordered persons making disturbance to be brought before him; held, not liable).

(*t*) And see *Shearman*, s. 66, p. 85.

(*u*) *Ante*, p. 1.

(*x*) See *Limpus v. London Omnibus Co.*, *supra* ("wantonly, carelessly, recklessly, and wilfully").

course of employment, and the line between such variation and an absolute departure must often be very fine (*y*).

It is said that "a master is not bound to anticipate a perfectly gratuitous trespass on the part of a servant, such, for example, as his entering without necessity upon a stranger's land. No presumption of authority arises from the fact of the act having been done for the master's benefit or from his silence in regard to it" (*z*). The fact that the act done was for the benefit of the master, however, must be some evidence of the act being done in the course of the employment (*a*), and if an illegal act be within the scope of the servant's probable authority, and be done for the master's benefit, the master would be held responsible (*b*).

Questions frequently arise as to whether the servant of the defendant was, at the time when the injury was caused, still in the defendant's service (*c*).

The master is liable for the negligence of under-servants employed by his servant by his authority, but this authority may sometimes arise by implication, and a question frequently arises as to whether such authority can be implied or not (*d*).

Where the management of anything is conducted by another other than the owner, the owner is *prima facie* responsible. The owner may rebut this presumption by showing that the person engaged in the management was not his servant (*e*),

(*y*) *Puryear v. Thompson*, 5 Humph. 397, cited in *Shearman*, s. 66, note 3, where an overseer beat a slave and killed him, intending to do so.

(*z*) *Shearman on Negligence*, s. 62; citing *Church v. Mansfield*, 20 Conn. 284. See also *Harris v. Nicholas*, 5 Munf. 483; *Lyons v. Martin*, 8 Ad. & E. 512 (driving cattle into master's close and then distraining.)

(*a*) See *Limpus v. General Omnibus Co.*, *ante*, p. 63.

(*b*) *Att.-Gen. v. Siddon*, 1 C. & J. 220.

(*c*) *Page v. Defries*, 7 B. & S. 137. A foreman of a wharf told defendant's

servant (a lighterman) to remove a boat. Held, that he was still acting as defendant's servant (overruling *Lamb v. Palk*, 9 C. & P. 621).

(*d*) *Simmons v. Monier*, 29 Barb. 419, (servant employed another man to throw snow off a house, master held liable.) *Booth v. Mister*, 7 C. & P. 66 (servant let another man drive his master's cart, master held liable).

(*e*) *Byrne v. Boadle*, 2 H. & C. 721; 33 L. J. Ex. 13; *Scott v. London Dock Co.*, 3 H. & C. 596; 34 L. J. Ex. 220. Also in cases of cabdriver and proprietor, see *Fowler v. Lock*, 41 L. J. C. P. 99;

but was the servant of somebody else (*f*). This may of course appear either from the plaintiff's own case or the defendant's, and may either be made to appear from direct evidence or from evidence as to the usual course of business. Thus, where it is the usual course of business to employ a contractor to do certain work, no presumption arises that the work is being done by the servants of the owner of the property (*g*).

The question who is the master of a person engaged in doing the act is one of frequent difficulty (*h*), and the difficulty does not seem to be removed by saying that he is the master whose will the servant represents (*i*).

Where a master allows his servant to be hired by another,

L. R. 7 C. P. 272; *Venables v. Smith*, L. R. 2 Q. B. D. 279; 46 L. J. Q. B. 470; in cases of shipowners and captains, see *Steel v. Lester*, 47 L. J. C. P. 43; L. R. 3 C. P. D. 121. *Laugher v. Forrester*, 5 B. & C. 547 (owner of carriage hired horses from stable keeper who provided driver); *Brady v. Giles*, 1 M. & Rob. 494 (question for the jury whose servant the driver is); *Quarman v. Burnett*, 6 M. & W. 499 (owner of carriage jobbing horses not liable for acts of driver, unless he orders him to drive in a particular manner, see *M'Laughlin v. Pryor*, 4 M. & G. 48); *Dayrell v. Tyrer*, 28 L. J. Q. B. 52; E. B. & E. 899 (lessee of ferry hired tug and crew of defendant, plaintiff contracted with lessee, crew negligent, held defendant liable; see *Fenton v. Dublin Steam Packet Co.*, 8 Ad. & E. 835). It may here be observed that if the plaintiff chooses to accept compensation from the driver of the vehicle, under 6 & 7 Vict. c. 86, s. 28, he cannot afterwards recover against the driver's employers; *Wright v. London Omnibus Co.*, L. R. 2 Q. B. D. 279.

(*f*) *Shields v. Edinburgh Ry. Co.*, Hay, 254; (defendant lent a van to a person who put his own horse in, and drove by his own servant, held the defendants, although owners were

not liable.)

(*g*) *Welfare v. London & Brighton Ry. Co.*, L. R. 4 Q. B. 693; 38 L. J. Q. B. 241.

(*h*) *Genl. Steam. Nav. Co. v. British & Colonial Steam Nav. Co.*, Law Rep. 4 Ex. 238; Ex. Ch. (Pilot compulsorily taken on board, not servant); *Corbin v. American Mills*, 27 Conn. 274; (plaintiff contracted with defendant to build a dam with stone which he obtained as part payment of another contract to remove the stone by blasting. He and his men were to be paid by the day, the defendant furnishing the powder for blasting and superintending the building of the dam, but having no control over the blasting, held, not a servant); *Stevens v. Squires*, 6 N. Y. 435, (B. sent his porter to remove a box from A.'s store, which A. had sold to him. A. gave permission to remove it; held, porter servant of B. not A.); *Merrick v. Brainord*, 38 Barb. 574, (carrier employed a tow-boat—persons in charge negligent—held carrier liable); *Murphy v. Caralli*, 3 H. & C. 462, (warehouseman having full control directed defendant's servants to pile bale of cotton, held, servants of warehousemen only.)

(*i*) See *Shearman*, s. 73.

he remains liable to the hirer (*k*) and to strangers (*l*), for negligence of such servant; and even where that other himself selects the servants although the master might not be liable for mere incompetency, yet he would be so for negligence (*m*). If the master abandons all control over the servant, and all right to discharge him, and these rights are taken by the hirer, of course the servant becomes the servant of the hirer.

In order to render a person liable for the acts of another employed by him to do a lawful act, the relation of master and servant must exist (*n*). Where such relation does not exist (but the person employed is what is called a "contractor") it is presumed that the person employed was employed to do the act in a reasonable and careful manner, and if he does not do so, his employer is not answerable (*o*). If the master himself interferes with the work he may render himself liable. The owner of premises employed a person to make a drain to the common sewer, and the workmen placed gravel on the highway to the injury of the plaintiff. The owner had been informed of the danger and had promised to remove the heap. The person employed paid a man for removing some of the gravel and charged the owner for such payment on account. It was held that the owner was liable on the ground that he had himself interfered with the work (*p*).

(*k*) *Holmes v. Onion*, 2 C. B. N. S. 790 (thatching).

(*l*) *Dalyell v. Tyrer*, El. B. & El. 899, (crew hired, paid, and controlled by defendant, steamer let out to H., held, defendant liable).

(*m*) *Holmes v. Onion*, *supra*.

(*n*) The case of employing another to do an act from which injury must flow, unless care be taken, is considered in Ch. III.; *Bower v. Peat*, L. R. 1 Q. B. D. 321; 45 L. J. Q. B. 446; *Tarry v. Ashton*, L. R. 1 Q. B. D. 314; 45 L. J. Q. B. 260; *Angus & Co. v. Dalton*, 48 L. J. Q. B. 225; L. R. 4 Q. B. D. 162.

(*o*) *Butler v. Hunter*, 7 H. & N. 826; 31 L. J. Ex. 214; (owner of

house and builder); *Peachy v. Rowland*, 13 C. B. 182, (man employed to make a drain; but see *Sadler v. Henlock*, 4 El. & Bl. 570; 24 L. J. Q. B. 138); *Cuthbertson v. Parsons*, 12 C. B. 304, (commissioners employed steam tug, owners held not liable); *Brown v. Accrington Cotton Co.*, 3 H. & C. 511, (building erected by contract, owner not interfering); *Taylor v. Greenhalgh*, L. R. 9 Q. B. 487; 43 L. J. Q. B. 168, (surveyor of highways employed another person and his men, and did not interfere, held, they were not servants of defendant).

(*p*) *Burgess v. Gray*, 1 C. B. 578.

Care should be taken in applying this rule to avoid two errors. In the first place, it should not be forgotten that where a person has a personal duty to perform, he cannot escape its performance by leaving it to some one else to do, and in the above cases there was no duty delegated; and in the second place, that if the person who has employed a contractor, has nevertheless impliedly promised the plaintiff that a certain state of things exists (as that a stand or bridge is safe), it becomes such person's duty to see that it is safe, and he is liable notwithstanding he has employed a competent person (*g*).

A "contractor" is one who engages to do a certain work for another, but is free to use such means to accomplish the result as he may see fit (*r*), and it is not conclusive evidence of service whether he is paid by the day or by the job (*s*).

The fact that a person employed to do any work is liable to dismissal by his employer, is strong evidence of his character as servant, and not contractor (*t*), but not conclusively so (*u*). But here, as in many other instances to which we have already referred, the difficulty lies rather in the facts than in the law. Thus, sometimes, an employer limits the control of the person employed as to the mode in which the work is done, though not as to the choice of workmen; or as to the choice of workmen, and not as to the mode of doing the work; but it is not proposed, as stated in Chapter I, p. 5, to deal with questions of this sort, which depend upon the constructions of particular contracts rather than upon the law of negligence.

The principle is now well established, both in England and America (*x*), although after a long course of conflicting

(*g*) See the cases *post*, Ch. III., s. 7, Corporations; and see *Francis v. Cockerell*, L. R. 5 Q. B. 501; 39 L. J. Q. B. 291; *Grote v. Chester Ry. Co.*, 2 Ex. 251.

(*r*) *Allen v. Hayward*, 7 Q. B. 960; *Sadler v. Henlock*, 4 El. & B. 570.

(*s*) Per Crompton, J., *Sadler v. Henlock*, *supra*.

(*t*) *Blake v. Thirst*, 2 H. & C. 20. See *Charles v. Taylor*, L. R. 3 C. P. D. 492.

(*u*) *Reedie v. North West. Ry. Co.* 4 Ex. 244.

(*x*) See *Shearman*, s. 79.

decisions in both countries, that the employer of a "contractor" is not responsible (where the work contracted to be done is not of itself dangerous) (*y*), or there is no duty incumbent upon the employer to do the thing himself (*z*), for the negligence of the contractor or his servants (*a*).

The same rule holds with respect to contractor and sub-contractor, if such sub-contractor is a contractor and not a servant (*b*).

The mere recommendation by the contractor's employer of a servant will not make him the servant of the employer, nor will the mere expression of a preference for one of the contractor's servants (*c*).

As we have already said, where there is a duty imposed upon or impliedly undertaken by the employer himself, he is liable for the due exercise of such duty.

Where an obligation is imposed upon any person by law he cannot escape from it by employing a contractor. Thus, where a statute ordered the owner of land to make a drain, and to refill it with earth, and the owner employed a contractor who neglected properly to refill the drain, it was held that the owner and not the contractor was liable (*d*).

(*y*) Or wrongful. See *Ellis v. Sheffield Gas Co.*, 2 Ell & Bl. 767; or naturally leading to danger. See *Bower v. Peate*, *ante*, p. 67.

(*z*) See *infra*.

(*a*) *Allan v. Hayward*, 7 Q. B. 960, (making a drain; *Butler v. Hunter*, 7 H. & N. 826 (architect employing contractor to pull down party wall); *Milligan v. Wedge*, 12 Ad. & E. 737 (butcher employing drover); *Steele v. South Eastern Ry.*, 16 C. B. 550 (contractor cutting through road into drain; *Reedie v. L. & N. W. Ry. Co.*, 4 Ex. 244, *supra* (contractor making viaduct); *Peachey v. Rowland*, 13 C. B. 182 (earth heaped up by a contractor so as to be a nuisance).

(*b*) *Rapson v. Cubitt*, 9 M. & W. 710 (club committee, builder, gas-fitter; held builder not liable); *Knight v. Fox*, 5 Ex. 721 (railway company employed contractor to make line,

sub-contractor to make bridge, sub-sub-contractor to supply scaffolding, sub-contractor to supply lights for scaffolding; injury to plaintiff from negligence with respect to scaffolding; held sub-contractor not liable, as sub-sub-contractor was not a mere servant, but was a contractor); *Overton v. Freeman*, 11 C. B. 867 (defendant contracted to pave a district, sub-contract to pave a street, contractor finding stones and carts, stones negligently left in street, contractor not liable; *Peason v. Cox*, L. R. 2 C. P. D. 369 (contractors built building and removed hoarding, sub-contractor's men doing interior let tool fall, held contractor not liable).

(*c*) *Quarman v. Burnett*, 6 M. & W. 499 (defendants asked for a particular driver; held not their servant).

(*d*) *Gray v. Pullen*, 5 B. & S. 970, 34 L. J. Q. B. 265; *Pickard v. Smith*

If the employer has in any way undertaken a duty in respect of the work which he has given to the contractor to do, he must, of course, perform such duty with reasonable care. So, if he undertakes to supply the contractor with things necessary for the prevention of injury to third parties, and injury arises from his neglect to do so, he will be liable (*e*).

So, also, it has often been held that the employer has a duty to see that after the contractor's servants have left off work, the works are left in a safe condition, so as not to injure strangers (*f*).

Owners of real property are not liable for the negligence of "contractors," any more than the owners of chattels (*g*), although for a long time it was held that they were.

If the work which the owner orders the contractor to perform be wrongful, the owner will be responsible to third parties for the wrongful acts so done by the contractor and his servants (*h*).

Where a person is the servant of the Government, as the Postmaster-General (*i*), the captain of a man-of-war (*k*), or of the public, as the surveyor of highways (*l*), he is not responsible for the negligence of others in the same employment, and this, notwithstanding that no action can be brought against the principal.

(occupier of refreshment room liable for coal merchant's servants negligently leaving cellar grating open); *Hole v. Sittingbourne Ry. Co.*, 6 H. & N. 488 (railway company to construct bridge by Act of Parliament; contractor negligent and company liable); *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93; 35 L. J. Ex. 225, H. L.; *Tarry v. Ashton*, L. R. 1 Q. B. D. 321; 45 L. J. Q. B. 446, and see "corporations performing statutory duties," *post* Ch. III., s. 7.

(*e*) *Gilbert v. Beach*, 5 Bosw. 445.

(*f*) *Smith v. Milne*, 2 Dow. 290 (person employed to plaster house, cut hole into staircase and left it; held, proprietor liable).

(*g*) *Gayford v. Nicholls*, 9 Ex. 702, overruling *Bush v. Steinman*, 1 B. & P. 404. See also *Reedie v. L. & N. W. Ry. Co.*, 4 Ex. 244; *Kight v. Fox*, Ex. 721; *Overton v. Freeman*, 11 C. B. 867.

(*h*) *Ellis v. Sheffield Gas Co.*, 2 El. & B. C. 707.

(*i*) *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Despencer*, Cowp. 754.

(*k*) *Nicholson v. Mounsey*, 15 East, 384.

(*l*) See *per* Blackburn, J., in *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, at p. 111, 35 L. J., Ex. 225, and see *Public Officers, infra*.

SECTION VII.

Neglect of Duties of Public Officers.

Public officers are, as we shall see, in general bound to exercise more than ordinary care in the discharge of their duties (*m*), and all that is necessary to notice here is that a sheriff in relation to the owner of the goods seized by him, is nothing more than a mere bailee, and is not bound to exercise more than ordinary care of them, so far as such owner is concerned; but with regard to the person employing him to seize, we shall see that he is bound to exercise a high degree of care (*n*).

(*m*) 1 *Post*, Ch. III., s. 13.

(*n*) *Post*, Ch. III., s. 13.

CHAPTER III.

NEGLECT OF DUTIES REQUIRING MORE THAN ORDINARY CARE.

SECTION I.

WE proceed now to the investigation of those classes of cases where the law demands something more than ordinary care. We have seen (*a*) that the law demands this sort of care where a person professes to have greater skill, or a higher degree of duty has been undertaken or some advantage obtained, or where the law deems it for the public benefit to require a greater amount of care.

Amongst ordinary duties requiring no particular skill or care *per se*, and yet requiring the greatest, by reason of their performance being for the sole benefit of the performer, are—*Gratuitous loan or commodatum in the case of the Bailee*. Where a man lends another something, not desiring any return for it, he may justly expect that great care will be taken of the thing lent by the person to whom he lends it. The bailor, on the other hand, is not bound (as we shall presently see, *post*, Ch. IV.) to take great care that the thing which he lends is not hurtful to the person to whom it is lent.

(*a*) *Ante*, Ch. I., p. 7.

The bailee is the person benefited by the loan, and the bailor has a right to demand from him something more than ordinary care. This is one of the principles derived by our law from the Roman law, and which has already been mentioned, *ante*, p. 8.

So, also, wherever a person does something for his own advantage, he must take something more than ordinary care to avoid injuring the rights of another. Thus, a person occupying property is bound, as we shall see (*b*), to take care that he deals with it so as not to injure persons being where they have a right to be (*c*).

Persons who take money for admission to public places, stands at races, &c., are bound for many reasons to exercise great care; for, firstly, there is great obvious danger in the fact that a crowd will probably be attracted to the place, and they have therefore undertaken a duty demanding great care; and it is, secondly, a thing done mostly for the benefit of the owner; and, thirdly, it is the duty of persons who *invite* the public into such places to see that they are safe (*d*). Nor can such persons shift their responsibility by saying that they employed a competent contractor, for the duty is of a positive kind, and cannot be delegated (*e*). There is, as we have said (*f*), in every invitation a sort of implied warranty of safety, by which the person invited is put off his guard, and prevented from examining with caution the position in which the inviter has placed him.

A volunteer also, that is to say, a person voluntarily doing something, although not paid for doing so, nor requested, is liable for something less than ordinary negligence, or, in other words, is bound to take more than ordinary care, for he has

(*b*) *Post*, s. 2.

(*c*) *Tarry v. Ashton*, L. R. 1 Q. B. D. 314; 45 L. J. Q. B. 260 (hanging lamp over highway); *Kearney v. London B. & S. C. Ry. Co.*, L. R. 6 Q. B. 759; 40 L. J. Q. B. 285 (bridge over railway); *Scott v. London Dock Co.*, 3 H. & C. 596; 34 L. J. Ex. 17

(sugar bag falling upon custom-house officer lawfully on premises).

(*d*) *Francis v. Cockerell*, L. R. 5 Q. B. 501; 39 L. J. Q. B. 291.

(*e*) See *Corporations*, *post*, Ch. III., s. 7, and *Master and Servant*, *ante*, p. 67.

(*f*) *Ante*, Ch. II. s. 2.

chosen to intrude himself into the affairs of another. It is otherwise, as we shall see, if he undertakes to do something in order to save a loss (*g*).

It would seem to be the law that wherever a person undertakes to perform a service (or is what the Roman law called a mandatory) he is bound to bring to the performance of such service that amount of skill and care which the service reasonably demands, and which, by accepting the service, he has undertaken to supply (*h*); and this is so, whether the mandatory is paid for his services or not (*i*). In the report of the judgment of Willes, J., in the "Law Journal" (*k*), that learned judge says: "In the case of a gratuitous bailment, it is said if you employ a man of no skill to ride your horse, he is bound to use such skill as he possesses, and that you can require no more, and that he is liable for gross negligence in that sense. But if you employ a man to ride your horse who professes to be a groom, he would be answerable unless he had competent skill in horse riding." But although this may be the English law, as it certainly was the Roman, yet the fact of the defendant not being paid for his services would, not unnaturally, influence the mind of a jury, although, logically speaking, it ought not. If it be the law that the fact of the services being gratuitous does not alter the degree of care required, then whether gratuitous or not the mandatory is bound by the law to exercise *skill*, and whether he has done so is a matter of fact unaffected by the legal question.

There is no doubt that where it is evident that persons hold themselves out to be persons of *skill*, they are bound to exercise *skill* (*l*). In *Jones v. Bird* (*m*), Bayley, C. J., says: "It is not enough that the defendants have acted *bond fide*

(*g*) *Post*, Ch. IV. See Wharton, s. 69, s. 534. As to volunteer being a "servant" see Ch. II., s. 7, part 1, note (*c*), *ante*, p. 58. As to injury to a volunteer see Ch. V., Contributory Negligence.

(*h*) See *Grill v. General Iron Screw*

Co., L.R. 1 C. P. p. 612, *per* Willes, J.

(*i*) See *ante*, p. 9, note (*g*).

(*k*) *Grill v. General Iron Screw Co.* 35 L. J. C. P. at p. 330.

(*l*) As to ordinary *skilled* workmen see the remarks *ante*, p. 20.

(*m*) *Jones v. Bird*, 5 B. & A. 837.

and to the best of their skill and judgment. They are bound to conduct themselves in a skilful manner, and the question was most properly left to the jury to say whether the defendants had done all that any skilful person could reasonably be required to do in such a case " (n).

Of this class are corporations who undertake the performance of difficult duties in consideration of the benefits bestowed upon them by their charter or statute (o); carriers (p) who undertake responsible and difficult duties (beyond their liability at common law), though, as we shall see as to carrying passengers, they appear to be performing a duty attended by serious danger, and may be classed amongst those persons who are dealing with dangerous goods. So also ship managers, as far as they are carriers of passengers. Physicians, surgeons (q), &c., would appear to belong to both classes; but innkeepers (r), solicitors (s), bankers (t), and public officers (u) are persons who have undertaken duties, not indeed dangerous to life or limb, but difficult to perform, and involving a high duty of care.

Where persons possess or use dangerous things they are bound to exercise more than ordinary care in their control of them, and, indeed, in some cases, as we shall see, to keep them safe at their peril. Of this class are persons keeping dangerous animals (x), dangerous goods (y), gas (z), machinery (a), and carriers of passengers (b).

Somewhat similar to the case of possessing or using dangerous things is that of a man pursuing a course of conduct which is likely to prove dangerous, and although such course of conduct may be perfectly legal, or even for the

(n) Cited by Blackburn, J., in delivering the opinions of the judges in *Mersey Docks v. Gibbs*, L. R. H. of L. 113; 34 L. J. Ex. 225; and see *Grill v. Genl. Iron Screw Co.*, *supra*.

(o) *Post*, s. 7.

(p) *Post*, s. 8.

(q) *Post*, s. 10.

(r) *Post*, s. 9.

(s) *Post*, s. 11.

(t) *Post*, s. 12.

(u) *Post*, s. 13.

(x) *Post*, s. 3.

(y) *Post*, s. 4.

(z) *Post*, s. 5.

(a) *Post*, s. 6.

(b) *Post*, s. 8.

public good, yet he is bound to exercise more than ordinary care in the presence of a danger known to himself. Thus, where a man, perhaps for some very good reason, is driving upon his wrong side of the road, he is bound to use more than ordinary care to avoid collision (*c*).

Where a positive duty is imposed by statute, it should seem that something more than ordinary care is required of the person who has to perform it, and it is certain that such person cannot shield himself by saying that he employed a competent person (contractor or other) to perform it (*d*).

So, also, where a statutory duty has to be performed by the defendant, the plaintiff has a right to calculate upon its due performance, and, when it is not performed, to infer that the occasion for its performance has not arisen, and to act on that inference (*e*), being put off his guard by the conduct of the defendant.

Common carriers are made liable, as it is said, by the custom of the realm, that is to say, that the law deems it expedient that they should be held strictly liable for the safety of the goods committed to their care. Their duties, as such common carriers, are therefore without the scope of this work (*f*), for they are liable without any negligence being shown; but, even where this absolute liability does not attach, we shall find that they are expected to exercise a high degree of care.

The contract to carry passengers is not within the duties of a common carrier, and carriers of passengers are not therefore insurers, and it has even been thought that the carrier of passengers ought only to be called upon to use ordinary care; but it is plain that, for the same reason that carriers of goods are held liable for slight negligence, so also

(*c*) *Puckwell v. Wilson*, 5 C. & P. 375, *ante*, p. 23.

(*d*) *Grey v. Pullen*, 5 B. & S. 970; 34 L. J. Q. B. 265; and see s. 7, Corporation performing statutory duties.

(*e*) *North Eastern Ry. v. Wanless*, 43 L. J. Q. B. 185; L. R. 7 H. L. 12 (gates of level crossing to be closed by statute left open).

(*f*) See s. 8, Carriers.

are carriers of passengers, viz., because the law thinks it expedient to compel carefulness in the interests of the public (*g*).

One obvious reason why the law thinks it expedient, in the case of common carriers, to compel carefulness is, because of the confusion and loss of property which would arise if carriers of goods were negligent; and one obvious reason why the law thinks it expedient to compel carefulness in carriers of passengers is because of the danger to human limb and life if such carriers were negligent. There are, no doubt, many other reasons; but, whatever the reasons may be, we think it is plain that the law demands something more than ordinary care from carriers of passengers.

Thus it is plain, we think, from the cases cited *post*, "Carriers," s. 8, that the Courts have treated the carriage of passengers by stage coach as a matter of serious public concern; and although they seem to use the words "ordinary care" and "due care" as synonymous, yet it is pretty plain that the judges seem to have thought that some considerable degree of care, to say the least of it, ought to be observed (*h*). It is to be considered that the passenger is there by invitation and has paid his fare, and therefore the coach-owner has undertaken to provide, not, indeed, for his safety in all events, but a considerable degree of security. So, also, it is clear that a considerable degree of care has been required of coach owners in providing a safe conveyance (*i*), so that they have been held liable even for latent defects (*k*).

The reader is now referred to the following sections in which the cases are collected, where, as it appears to the author, more than ordinary care seems to have been demanded. The reader will be pleased to remember that the language of the judges will not entirely bear out the doctrine that more

(*g*) *Redhead v. Midland Ry. Co.*,
per Blackburn, J., L. R. 4 Q. B. 379;
38 L. J. Q. B. 169; and see *ante*, p. 4.
(*h*) *Redhead v. Midland Ry. Co.*,

supra.

(*i*) *Bremmer v. Williams*, 1 C. & P.
414.

(*k*) *Sharp v. Grey*, 9 Bing. 457.

than ordinary care has been demanded, the words "ordinary" and "reasonable" being used, but evidently (as the author thinks), in many cases, as meaning ordinary and reasonable *under the circumstances*, that is to say, more than ordinary and reasonable in ordinary circumstances.

SECTION II.

Neglect of Duties of Owners and Occupiers of Real Property.

The neglect of their duties by the owners of property has been more fully discussed in a former chapter (*l*), and it is only necessary here to point out how far such owners are bound to exercise something more than ordinary care in dealing with their property so as not to injure another.

It is said that something more than ordinary care is required where a man is using his own property for his own private advantage or pleasure (*m*). It seems, however, not free from doubt whether, if a man uses his property for his own advantage in an ordinary manner and so as not to be reasonably likely to involve danger he would be bound to exercise more than ordinary care; but if he used his property in an extraordinary manner for his own advantage (*n*) or so as to be likely to involve danger (*o*) he would be clearly bound to exercise something more than ordinary care. In these latter cases where persons undertake extraordinary matters or matters likely to involve danger they must be assumed to undertake to exhibit skill or to use extraordinary

(*l*) Ch. II., s. 2.

(*m*) Campbell, s. 13. p. 15.

(*n*) Fletcher v. Rylands.

(*o*) Clerk v. Chambers; Bower v. Peate, L. R. 1 Q. B. D. 321; 45 L. J. Q. B. 446.

care (*p*) and cannot excuse themselves by delegating their duty to some one else (*q*).

The first proposition, however, although doubtful, the author thinks may be supported. In principle it would appear to be correct, and Mr. Campbell (*r*) cites authorities to justify that position. The cases cited by him, however (*s*), are those in which the Court presumed negligence from the mere fact of the accident, and he assumes that to be equivalent to saying that evidence of slight negligence is sufficient; and he argues that some positive and direct evidence of negligence ought to have been adduced to prove *ordinary* negligence. But the explanation is that there is a difference between slight evidence of negligence and evidence of slight negligence, and so far from saying that evidence of slight negligence would be sufficient, Cockburn, C.J., presumed a want of ordinary care in the railway case, and Channell, B., made the same presumption in *Byrne v. Boadle*. These cases were decided upon the principle of the maxim *res ipsa loquitur* (*t*), and, when the fact was once allowed to be evidence of negligence at all, it might be evidence equally in most of the cases of slight, ordinary, or gross negligence. The better way, as it is again submitted, is to point out that in these cases there was a duty upon the defendants, who for their own advantage were using their property in a manner which might cause injury, to exercise something more than ordinary care, and the question is did they reasonably fulfil that duty.

The grantee of a market who takes a toll for his own benefit incurs an obligation to maintain the market in a state reasonably fit for the purpose for which it was granted (*u*),

(*p*) *Clerk v. Chambers*, *supra*.

(*q*) *Bower v. Peate*, *supra*.

(*r*) *Campbell*, ss. 14, 15, 16.

(*s*) *Kearney v. L. B. & S. Ry. L. R.* 5 Q. B. 411; 6 Q. B. 759; *Scott v. Liverpool Dock Co.*, *ante*, p. 65; *Byrne v. Boadle*, *ante*, p. 65; *Briggs v. Oliver*,

35 L. J. Ex. 163.

(*t*) See *post*, Ch. VI.

(*u*) *Per Lush. J. Lax v. Darlington* (Mayor of), 48 L. J. Q. B. 143.; *aff. on app. L. R.* 5 Ex. D. 28; 49 L. J. Ex. 105.

and if he erects an obstruction (*x*) which causes danger to the property or persons who frequent the market he is as much liable as one who does so on a highway.

The same principle applies to the conduct of railway companies with respect to level crossings. With respect to implied invitations by them to persons to cross, as by leaving their gates open when they are by statute ordered to keep them shut, &c., their duties will be discussed presently (*y*). But apart from their statutable duty they are by running trains upon a level crossing using their property in a manner likely to cause danger, and it is their duty to exercise something more than ordinary care (*z*).

So, also, as we have seen (*a*), railway companies are bound to prevent sparks flying from their engines upon the lands adjoining their lines, so as to cause injury, unless they are protected by the powers granted to them by Parliament, and where they are so protected, they must still, as I think, use something more than ordinary care to prevent damage from a cause so likely to be dangerous (*b*).

Where a person invites another upon his premises it should seem that he is bound to exercise more than ordinary care; even although the coming upon the premises may be partly for the benefit of the person invited, for he has taken upon him a duty of a high degree (*c*). If the person giving the invitation gives it for his own benefit alone it is clear that he will be answerable for what is called slight negligence; or,

(*z*) Defendants had placed some low spiked railings round a statue in the cattle market.

(*y*) Next pages.

(*z*) *Manchester S. Y. R. Co. v. Fullarton*, 14 C. B. N. S. 54 (engine-driver blowing off steam). *Stubley v. L. & N. W. Ry. Co.*, L. R. 1 Ex. 13; 35 L. J. Ex. 3 (placing no watchmen, see also *Bilbee v. L. B. & S. C. Ry. Co.* 18 C. B. N. S. 584; 34 L. J. C. P. 182, 100 trains passing in the day.) See, however, *Skelton v. L. & N. W. Ry. Co.*, L. R. 2 C. P. 631,

post, Ch. V., Contributory Negligence (ring which fastened gate not on post, but goods train standing on the crossing, held on the whole no invitation and contributory negligence in plaintiff).

(*a*) *Ante*, 32.

(*b*) *Jones v. Festiniog Ry.*, L. R. 3 Q. B. 733; 37 L. J. Q. B. 214; *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 685; and see *ante*, p. 32, note (*s*).

(*c*) *Campbell*, s. 32; *Shearman*, 499a, p. 594.

to speak more correctly, he is bound to exercise something more than ordinary care. But even where the invited person derives benefit from coming upon the premises, he seems to be entitled to the exercise of something more than ordinary care on the part of the inviter. Thus where the person invited comes upon the premises in the execution of a contract with the inviter, and it is for the advantage of both that he should come upon the premises, the inviter has taken upon himself a higher degree of duty than if the person upon the premises were a mere licensee, or mere guest (*d*), to whom he would only be liable for something in the nature of a trap, as we have seen (*e*), or, perhaps, for ordinary negligence.

The reason of this seems to be that the invitation puts the plaintiff off his guard, implying some sort of warranty of safety (*f*) ; so that, he not being called upon to look out for himself, it is the more incumbent upon the inviter to use great care.

A question often arises as to whether there has in fact been an invitation, or whether the person coming on the premises is only what is called a bare licensee (*g*).

Thus in the ordinary case of a customer going into a shop to purchase goods (*h*) there is an invitation, and the customer has a right to expect to be taken care of (*i*), and the same is the case of passengers by railway who, as we shall see (*k*), have a right to expect not only that the premises are safe, but also that the carriages are safe. The same rule applies to wharfs and docks, as we shall see (*l*), and to all cases where persons by their conduct hold out to others that they

(*d*) *Holmes v. N. E. Ry. Co.*, L. R. 4 Ex. 254 ; 38 L. J. Ex. 161. *Southcote v. Stanley*, 1 H. & N. 247 ; 25 L. J. Ex. 339. *Francis v. Cockrell*, ante, p. 73.

(*e*) *Ante*, Ch. II., s. 2.

(*f*) *North-Eastern Co. v. Wanless*, L. R. 7 H. L. 12 ; 43 L. J. Q. B. 185. See also *D. W. & W Ry. Co. v. Slattery*, L. R. 3 App. Cas. 1155.

(*g*) *John v. Bacon*, L. R. 5 C. P. 437 ; 39 L. J. C. P. 365.

(*h*) See *Indermaur v. Dames*, L. R. 1 C. P., per Willes, J., p. 287 ; 2 C. P. 311, 36 L. J. C. P. 181.

(*i*) *Chapman v. Rothwell*, El. Bl. & El. 168.

(*k*) *Post*, carriers, s. 8.

(*l*) *Post*, wharfs, sub.-s. 2.

may safely come upon their property. Thus where ferrymen put down a slip from the ferry to the shore for a horse to be led across (although they did not profess to take care of horses) and the rail was negligently loose and broken, it was held they were liable; Maule, J., saying, "suppose it was the duty of one to provide another with a chair, I apprehend that duty could not be said to be fitly and adequately performed by providing him with a chair having a tenpenny nail driven up through the bottom of it" (*m*).

And where a person makes a pathway and permits it to be used to his house he invites all persons who have any reasonable ground for coming to his house to use the pathway, and he would be responsible for neglecting to fence off dangerous places (*n*). So also where a contract has been entered into, and the plaintiff comes upon the premises in pursuance of the contract, he comes by invitation (*o*).

Where the plaintiff, a licensed waterman, came upon the premises to complain of a barge being improperly navigated, and was referred by defendant's man to the foreman, and, while on his way to see him, he was injured by the fall of a bale of goods, it was held that whether he was there by invitation or was a bare licensee the defendants were liable, but in the judgment of the Court he was there by invitation (*p*).

Where a railway company is bound by statute to shut the gates of a level crossing while a train is approaching, and omits to do so, it invites a person to cross the line, and thereby puts him off his guard (*q*), and is liable for the

(*m*) *Willoughby v. Horridge*, 12 C. B. 742.

(*n*) *Lancaster Canal Co. v. Parnaby*, 11 Ad. & E. 243, per Tindal, C.J.

(*o*) *Holmes v. N. E. Ry. Co.*, L. R. 6 Ex. 123; 40 L. J. Ex. 121; *Indermaur v. Dames*, L. R. 2 C. P. 311; 36 L. J. C. P. 181.

(*p*) *White v. France*, L. R. 2 C. P. D. 308; 46 L. J. C. P. 323. See also *Smith v. Steele*, L. R. 10 Q. B. 125;

44 L. J. Q. B. 60; *Smith v. London & St. Katherine Docks*, L. R. 3 C. P. 326; 37 L. J. C. P. 217; *Wright v. London & N. W. Ry. Co.*, L. R. 1 Q. B. D. 252; 45 L. J. Q. B. 570.

(*q*) *N. E. Ry. Co. v. Wanless*, L. R. 7 H. L. 12; 43 L. J. Q. B. 135; see also *Stapley v. L. B. & S. E. Ry. Co.*, L. R. 1 Ex. 21; 35 L. J. Ex. 7. As to level crossings, see *Railway Clauses Act, 1863*,

injuries which ensue. The question of "invitation" or not, is a question of evidence into which we need not enter at greater length. The question chiefly considered here is, when an invitation has been shown what sort of negligence will render the inviter liable for damages.

SECTION II.—SUB-SECTION I.

Owners of Docks, Wharfs, &c.

Where a person, company (*r*), or corporation (*s*), is intrusted by statute with the execution of certain duties and to receive tolls, they are liable for negligence in the performance of those duties, and it should seem for something less than ordinary negligence (*t*). "The common law imposes a duty upon the proprietors, not perhaps to repair the canal or absolutely to free it from obstruction, but to take reasonable care so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property" (*u*). They have no right with a knowledge (or culpable ignorance) of the dangerous condition of the dock to keep it open and invite the vessels into peril by holding out that upon payment of tolls, any ship may enter and navigate the dock (*x*). It is immaterial whether

(*r*) *Lancaster Canal Co. v. Parnaby*, 11 Ad. & El. 223; see *Corporations*, Ch. III., s. 7.

(*s*) *Mersey Docks v. Gibbs*, L. R. 1 H. of L. 93; 35 L. J. Ex. 225.

(*t*) See Campbell, p. 35, 2nd ed. In so far as a statutory duty is neglected, the law will be found treated of under the title, *Corporations*, see Ch. III., s. 7.

(*u*) *Lancaster Canal Co. v. Parnaby*, *supra*, at p. 242; *Mersey Docks v. Penhallow*, 7 H. & N. 329, Exch. Ch.; 30 L. J. Ex. 329 (accumulation of mud in dock); L. R. 1 H. L. 93; 35 L. J. Ex. 225.

(*x*) *Gibbs v. Trustees of Liverpool Docks*; 3 H. & N. 164; Exch. Ch. *S. C. Mersey Docks v. Gibbs*; L. R. 1 H. L. 93; 35 L. J. Ex. 225.

or not they are bound by their Act to repair, or whether the premises or works are vested in or constructed by the defendants (*y*).

"The subject using a port or market, is not a mere licensee; he is exercising a right as one of the public for whose benefit the port or the market was made, and is entitled to have a free and safe passage in the one case, and a safe standing place in the other" (*z*).

It makes no difference that the docks are in the hands of a corporation, who derive no profit personally from the tolls which are devoted to the maintenance of the works and the payment of the debt contracted in their execution, and in case of any surplus are reduced for the benefit of the public (*a*).

It does not matter whether the obstruction which causes the injury to a vessel using a dock is one which has grown up in a channel, once well cleared, or whether such channel was opened for public use before the obstruction was cleared away (*b*).

The care required of dock and wharf owners seems to be the same with respect to all persons expressly or impliedly invited upon their premises, whether they are using the dock for the purposes of a dock or not (*c*).

The duties of harbour and pier masters, and others, are defined by the 10 & 11 Vict. c. 27 (The Harbours, Docks, and Piers Clauses Act, 1847) (*d*). Their masters, the trading docks companies or corporations, or trustees, are liable for their

(*y*) *Winch v. Conservators of the Thames*, L. R. 9 C. P. 378; 43 L. J. C. P. 167; Exch. Ch., *diss.* Cleasby, B. (towing path not constructed by or vested in defendants).

(*z*) *Per Lush, J., Lax v. Darlington* (Mayor of), 48 L. J. Q. B. 143. Aff. on App. 49 L. J. Q. B. 105; L. R. 5 Ex. D. 28.

(*a*) *Mersey Docks v. Gibbs*, *supra*.

(*b*) *Thompson v. North Eastern Ry. Co.*, 31 L. J. Q. B. 194.

(*c*) *Manley v. St. Helen's Canal Co.*,

2 H. & N. 840 (bridge opened for boat passenger on highway fell in); *Smith v. London Docks*, L. R. 3 C. P. 326 (plaintiff invited by ship's officer, gangway insecure); *White v. France*, L. R. 2 C. P. D. 308; 46 L. J. C. P. 823 (plaintiff told to go to wharf, bale of goods fell); see these cases, *ante*, p. 82.

(*d*) And see 24 & 25 Vict. c. 45; 25 & 26 Vict. cc. 19, 69. For Royal Dockyards, see 28 & 29 Vict. c. 125.

negligence, and not merely for negligence in their appointment or choice of such officers (e).

SECTION III.

Neglect of Duties of Owners of Dangerous Animals.

We have seen, *ante* Ch. II., s. 3, that owners of "savage" animals, such as lions, tigers, &c., must keep them at their peril, and also that the owners of ordinary "tame" animals must exercise the ordinary care with respect to them which is suited to their particular nature and habits. There is, however, a class of animals differing from each of these, and which we have denominated "dangerous." We intend by this expression those kind of animals which may be and often are dangerous to mankind, or to other animals, as a class, (such as bulls), and also those particular animals of which the class may be harmless, but the animal itself is not so (as dogs or cats). We have also remarked that where the class of animal is harmless the owner is not answerable in an action of negligence for injurious acts done by his particular animal, contrary to the nature and habits of its class, unless he was aware of such mischievous disposition (f), in which case the law says he must, as in the case of a savage animal, keep it at his peril (g). Where the question of *scienter* arises and the liability becomes absolute, the question of "negligence" does not arise.

It therefore remains only to consider the case where a

(e) *Mersey Docks v. Gibbs*, *supra*, commenting on *Metcalfe v. Hethrington*, 11 Exch. 257.

(f) *Mason v. Keeling*, 1 Ld. Raym. 606; *Buxendin v. Sharpe*, 2 Salk. 662

(bull running at a man); *Cox v. Burbidge*, 13 C. B. N. S. 430; 32 L. J. C. P. 89 (horse kicking child).

(g) *Ante*, p. 41.

person has the control of animals which are notoriously "dangerous"; and it seems most reasonable that he should exercise with respect to them something more than ordinary care. He has undertaken to control a sort of animal which notoriously demands more than ordinary care, and accordingly the law imposes a corresponding duty upon him. The particular acts necessary to control such an animal will vary according to circumstance. A bull in a street requires the utmost care (*h*), in a field it would require less; but in any case it is submitted that something more than the ordinary care required to control animals of a harmless or domestic character must be used. Horses in a street also require more care, for they may take fright and injure the passers by (*i*).

In the argument in *Mason v. Keeling* (*k*), cases are mentioned where an action was held maintainable without alleging *scienter*, viz., a case of a pair of young horses; an ox getting loose from a stall; a monkey biting a child, and a chained fox; and it was replied that, whatever might be the case with respect to those animals, a dog is a domestic animal, and does not require such a guard to be set over it as other animals which are not so familiar to human kind, and consequently may be supposed to be more easily irritated to do mischief. And in the judgment of Holt, C.J., it is said "For there is a great difference between horses and oxen in which a man has a valuable property and which are not so familiar to mankind, and dogs. The former the owner ought to confine, and take all reasonable precaution that they do no mischief, otherwise an action will lie against him; but otherwise with dogs before he has notice of some mischievous quality." It seems to be doubtful whether a bull is a dangerous animal (*l*). It has been held, however, that a *scienter* must be proved to make a man liable for his bull running at

(*h*) *Ficken v. Jones*, 28 Cal. 618; but see *infra*.

(*i*) *Lynch v. Nurdin*, 1 Q. B. 38, was a case of this sort.

(*k*) *Mason v. Keeling*, 1 Ld. Raym. 606.

(*l*) See Wharton, s. 910.

another man (*m*); and the same has been held with respect to rams (*n*). In the case of a monkey (*o*), it seems that the sort of knowledge which would affect the defendant's liability was more one of general knowledge of the propensities of that kind of animal, though particular knowledge was no doubt alleged.

SECTION IV.

Neglect of Duties by Owners of Dangerous Goods, &c.

There can be no doubt that the owners or controllers of dangerous goods are bound to exercise more than ordinary care, as for instance in the use of a gun (*p*), or in the use of fireworks (*q*); for they have not only taken upon them a matter or business requiring great care; but the law, having regard for human life and safety, demands great care from them. This policy of the law applies, as we have already pointed out, to other matters besides dangerous goods, viz.: to a dangerous use of real property (*r*). Where a prudent man would reasonably foresee great danger there he would also exercise great care, and culpable negligence is, as we have said (*s*), doing an act which a reasonably

(*m*) *Hudson v. Roberts*, 6 Ex. 699; 20 L. J. Ex. 299.

(*n*) *Jackson v. Smithson*, 15 M. & W. 561.

(*o*) *May v. Burdett*, 9 Q. B. 101.

(*p*) *Dixon v. Bell*, 5 M. & S. 198 (allowing girl to take a gun), and see per Lord Denman in *Lynch v. Nurdin*, 1 Q. B. 29; *Deane v. Clayton*, 7 Taunt. 489 (defendant intentionally, not carelessly, put dog spikes in his wood, trespass); but see *Jordin v. Crump*, 8 M. & W. 782; *Ilott v. Wilkes*, 3 B. & Ald. 304 (spring

guns); *Bird v. Holbrook*, 4 Bing. 628 (springgun, plaintiff trespasser); *Shearman*, s. 24 and 587; see these cases commented on in *Lynch v. Nurdin*, 1 Q. B. 29; and in *Clark v. Chambers*, 47 L. J. Q. B. 429; L. R. 3 Q. B. D. 327.

(*q*) See *Scott v. Shepherd*, 2 W. Bl. 892 (trespass by throwing a squib); *King v. Ford*, 1 Stark. 421 (negligence in schoolmaster allowing pupils to use fireworks).

(*r*) *Ante*, p. 73.

(*s*) *Ante*, p. 1.

careful man would foresee might be productive of injury and which he would abstain from doing.

So persons are bound to use the very greatest care in the use of poisonous drugs (*t*), or highly explosive materials (*u*), or materials otherwise dangerous or destructive (*x*), and of the same class of cases are those of placing a dangerous instrument upon a highway (*y*).

Numerous statutes have been from time to time passed, inflicting penalties upon persons carelessly dealing with dangerous goods, but these are beyond the scope of the present work, which deals only with those breaches of duty for which a right of action arises, and not with questions of public safety and police (*z*). The imposition of penalties does not take away the right of action, if such a right exists apart from the statute; but it does not, perhaps, follow that where a statute orders something to be done and imposes a penalty, that a right of action is given (*a*).

SECTION V.

Gas Companies, Fitters, &c.

With respect to the duties of gas companies, and persons

(*t*) *Shearm. s. 592*. In *Thomas et uxor v. Winchester*, 6 N. Y. 397, the defendant sold through his assistant a bottle of belladonna for dandelion to a druggist who sold it to another druggist who sold to the female plaintiff, and defendant was held liable for negligence on the ground (amongst others) that he was bound to exercise more than ordinary care.

(*u*) *Shearm. s. 592*; *Carter v. Towne*, 98 Mass. 567.

(*z*) *Brass v. Maitland*, see per *Crompton, J.*, 6 El. & B. 470 (chloride of lime stowed in vessel); *Farrant v. Barnes*, 11 C. B. N. S. 553.

(*y*) *Clark v. Chambers*, L. R. 3 Q. B. D. 327; 47 L. J. 427, where most of the cases above cited are very elaborately reviewed by Cockburn, C.J.

(*z*) These statutes have been consolidated in the 38 & 39 Vict. c. 17. As to carriage by railway, see 8 & 9 Vict. c. 20; by tramways, 33 & 34 Vict. c. 78; as to shipping, 36 & 37 Vict. c. 85, ss. 23—28; 38 & 39 Vict. c. 17, ss. 42, 101. As to petroleum, &c., see also, 34 & 35 Vict. c. 105.

(*a*) *Atkinson v. Newcastle Waterworks*, L. R. 2 Ex. D. 441; 46 L. J. Ex. 775; commenting on *Couch v. Steel*, see *post*, p. 103.

having the management of gas, it would appear that they are bound to exercise the very greatest care, for they are using a material difficult to manage, and of a very dangerous character in many ways, for it is at once explosive and poisonous; and, not unreasonably, these companies are bound in heavy penalties by their Acts to exercise the greatest care, and even to become in some sense insurers (*b*).

It is true that the language sometimes used is that such companies are only liable for ordinary negligence; but it is added that "those who carry on operations dangerous to the public are bound to use all reasonable precautions" (*c*), and as "reasonable precautions" in dealing with such a material as gas are equivalent to taking the greatest possible care, it seems misleading to say that such companies are only liable for ordinary negligence.

Gas companies are liable for neglecting to repair their pipes, and are bound to inspect them so as to become aware of any escape; and if such escape has existed for several days, and was discoverable by the company if they had exercised a proper supervision, they are liable; and it is no answer that immediately upon express notice they sent to do the repairs, but sent too late (*d*).

They are bound not only to keep in order their own works, but they are bound to exercise care in repairing or investigating pipes, &c., of persons to whom they are supplying gas (*e*). Such persons ought to give notice of an escape by way of warning to the company; and in the absence of such notice, or some reasonable opportunity of knowing, the company would not be liable (*f*).

A gasfitter was employed to repair a gas-meter. He took

(*b*) *Hipkins v. Birmingham Gas Co.*, 6 H. & N. 250 (gas fouling a well).

(*c*) *Blenkiron v. Great Cent. Gas Co.*, 2 F. & F. 440.

(*d*) *Mose v. Hastings Gas Co.*, 4 F. & F. 324.

(*e*) *Burrows v. March Gas Co.* L. R. 5 Ex. 67; 7 *id.* 96; 41 L. J. Ex. 46; *Lannen v. Albany Gas Co.*, 46 Barb. 264; affirmed, 44 N. Y. 459.

(*f*) *Lannen v. Albany Gas Co.*, *supra*.

it away, and supplied a temporary pipe. The plaintiff, a servant, in the course of his duty, and without any negligence, went to light the gas, and was injured by the negligence of the gasfitter. Lopes, J., after consideration, said: "I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which unless managed with the greatest care is calculated to cause injury to bystanders. To support such a right of action there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud or misrepresentation or concealment, nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract" (g).

SECTION VI.

Persons employing Machinery.

In a manufacturing country like England it is not surprising that the common law duty of taking reasonable care has been found scarcely adequate to protect persons from the dangers arising from complicated and dangerous machinery, and consequently we find that statutes have been passed for the protection of persons employed near or about machinery of a dangerous nature. It was found very difficult to say in each particular case at common law what particular mode of using care ought to have been adopted. Persons employing machinery are bound to provide machines reasonably fit for use (h); and in a matter where the thing itself is difficult to

(g) *Parry v. Smith*, L. R. 4 C. P. D. 6 H. & N. 565; 30 L. J. Ex. 127
825; 48 L. J. C. P. 731. (drying machine—steam application).
(h) *Cowley v. Mayor of Sunderland*,

make and to control, and the effects of bad manufacture or careless control might be very serious, I cannot doubt that persons employing machinery are bound to use something more than ordinary care.

It appears that persons setting up machines are not bound to fence them as against a mere licensee (*i*), and *a fortiori* they are not bound to prevent persons from improperly meddling with machinery (*k*).

If fencing be put up of such a character as reasonably to mislead a person into a false belief that the machine might be safely approached, the defendant would, it appears, be liable for such negligent fencing (*l*).

By the 7 Vict. c. 15, s. 21, and 19 & 20 Vict. c. 38, s. 4, now both repealed, see *infra*, provision was made for the fencing of machinery, and remedies by way of penalties were provided by subsequent sections of the Act (42—51; 59) (*m*).

The section only applied to rooms in which a manufacturing process is going on (*n*), and to such of the machinery as is in motion for some manufacturing process, and it was not sufficient that the part of the machine in question was connected with another part of the machine which was in motion for a manufacturing process (*o*). "Mill gearing" was held not to be confined to those parts by which motion was first communicated to the machine (*p*).

(*i*) *Bolch v. Smith*, 7 H. & N. 736; 31 L. J. Ex. 203 (machine in dock-yard—road to a privy); *Caswell v. Worth*, 25 L. J. Q. B. 121 (carpet manufactory—not fenced under Act).

(*k*) *Mangan v. Atterton*, 4 H. & C. 388; L. R. 1 Ex. 239; 35 L. J. Ex. 161 (machine for crushing oil-cake in market; boy trespasser); but as to this case see judgment in *Clark v. Chambers*, 47 L. J. Q. B. 427, at p. 434; L. R. 3 Q. B. D. 327.

(*l*) *Bolch v. Smith*, *supra*: see also *per* Willes, J., *Corby v. Hill*, 4 C. B. N. S. 556.

(*m*) The action of negligence lies notwithstanding the remedy by penalty: *Caswell v. Worth*, 25 L. J. Q. B.

121, in course of argument, *per* Campbell, C.J.; *Couch v. Steel*, 23 L. J. Q. B. 121; *Atkinson v. Newcastle Waterworks Co.*, L. R. 2 Ex. D. 441; 46 L. J. Ex. 775. An action will not lie in all cases where a statute orders something to be done under the sanction of a penalty, but the penalty does not take away a right which existed before the statute. Penalties are provided by ss. 81, 82 of the new Act, *infra*. The former penalty was not more than £20, now it is £100.

(*n*) *Coe v. Platt*, 7 Ex. 923 (mill gearing).

(*o*) *Coe v. Platt*, 7 Ex. 460.

(*p*) *Holmes v. Clarke*, 30 L. J. Ex. 135; 31 *id.* 356 (mill gearing).

As in other cases, the doctrine of contributory negligence was held to apply, although the statutory duty had been neglected by the defendant (*q*).

It was a matter of great doubt how far male adults were entitled to the benefit of these provisions (*r*).

The words of the statute are absolute, and it seems that it is not for the jury to consider whether the machinery was so dangerous as to require fencing (*s*), but that in all cases within the statute the machinery shall be securely fenced.

Various penalties are awarded against persons employing workmen in dangerous employments by different statutes. Such are 35 & 36 Vict. c. 76, s. 51 (Mines Regulation Act) (*t*);

(*q*) *Caswell v. Worth*, 25 L. J. Q. B. 121, *supra*. See *per* Channel, B., *Britton v. Gt. Western Cotton Co.*, *infra*.

(*r*) See *Coe v. Platt*, *supra*; and see the doubt expressed by Cockburn, C.J., in *Holmes v. Clarke*, 31 L. J. Ex. 358. It should seem that although the object of the Act was to protect children, yet if an adult without negligence is hurt, *à fortiori*, the machinery is more dangerous, and ought to be fenced; and therefore, as in *Holmes v. Clarke*, it is probable that where an adult is injured there has been a breach of the common-law duty to fence. It seems illogical that an adult's right of action should depend upon whether women and children happen to be employed. *Bramwell, B.*, in *Britton v. Gt. Western Cotton Co.*, L. R. 7 Exch. 136, seemed to think that the 21st section of the first Act does not limit the duty of fencing to places where young persons are employed, except in the case of hoists and teagles (although it is submitted that the words referring to young persons govern the whole of the preceding words); and that the 4th section of the second Act only limits the duty to "mill-gearing;" and that the obligation as to other machinery is absolute, and applies equally to adults. This view of the section still left open the question whether,

when an adult is injured by the want of fencing of "a hoist or teagle," or "mill-gearing," he could bring an action for negligence under the statute. This doubt has been removed by the new Act (see *infra*), which extends to every person, except, in sect. 7, as to vats and pans, where the very same question might arise if an adult were to fall into a vat or pan.

(*s*) *Doel v. Sheppard*, 25 L. J. Q. B. 124.

(*t*) The following are some of the cases decided upon this Act or in connection therewith: — *Dickenson v. Fletcher*, 9 L. R. C. P. 1; 43 L. J. M. C. 25 (owner not liable for servant not locking lamps); *Howells v. London Steel Co.*, 44 L. J. Q. B. 25; 10 L. R. Q. B. 62 (certificated manager a fellow-servant with workmen); *Evans v. Mostyn*, L. R. 6 C. P. D. 547; 47 L. J. M. C. 25 (who is a "person interested"); *Higham v. Wright*, L. R. 2 C. P. D. 397; 46 L. J. M. C. 223 (breach of special rules); *Prentice v. Hall*, 37 L. T. N. S. 605 (checkweigher misconducting himself by intimidation); *Reg. v. Spon Lane Coll. Co.*, L. R. 3 Q. B. D. 673 (colliery owner only answerable for what lies in his own power); *Baker v. Carter*, L. R. 3 Ex. D. 132; 47 L. J. M. C. 87 (non-resident part-owner excused after appointing certificated manager).

41 Vict. c. 12, s. 1 (Threshing Machines); 41 Vict. c. 16, ss. 5—9 (Factories).

By the 41 Vict. c. 16 (*u*) (which came into operation on the 1st of January, 1879), sect. 5, it is enacted that “with respect to the fencing of machinery in a factory the following provisions shall have effect :—

- “ 1. Every hoist or teagle near to which any person is liable to pass, or to be employed, and every flywheel directly connected with the steam or water, or other mechanical power, whether in the engine-house or not, and every part of a steam-engine and water-wheel, shall be securely fenced ; and
- “ 2. Every wheel-race not otherwise secured shall be securely fenced close to the edge of the wheel-race ; and
- “ 3. Every part of the mill gearing shall either be securely fenced, or be in such position, or of such construction, as to be equally safe to every person employed in the factory as it would be if it were securely fenced ; and
- “ 4. All fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion or use for the purpose of any manufacturing process.

“ A factory in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act” (*x*).

By sect. 6 provision is made for the mode of procedure to recover a penalty where sect. 5 does not apply, and where the inspector considers that machinery is not securely fenced.

By sect. 7 it is provided that : “ Where an inspector considers that in a factory or workshop, a vat, pan, or other structure, which is used in the process or handicraft carried

(*u*) The Factory and Workshops Act, 1878.

(*x*) By s. 81 this involves a fine not exceeding £10. But the penalty in case of death or injury arising from

not fencing is given by s. 82, and is a fine not exceeding £100, to be applied for the benefit of the injured party or his family, or otherwise as a Secretary of State determines.

on in such factory or workshop, and near to or over which children or young persons are liable to pass, or to be employed (y), is so dangerous, by reason of its being filled with hot liquid or molten metal, or otherwise as to be likely to be a cause of bodily injury to any child or young person employed in the factory or workshop, he shall serve on the occupier of the factory or workshop a notice, requiring him to fence such vat, pan, or other structure.

“The provisions of this Act with respect to the fencing of machinery which an inspector considers not to be securely fenced, and to be dangerous, shall apply in like manner as if they were re-enacted in this section with the substitution of the vat, pan, or other structure for machinery, and with the addition of workshop; and if the occupier of a factory or workshop fails constantly to maintain the fencing required under this section in an efficient state while such vat, pan, or other structure is so filled or otherwise dangerous as aforesaid, the factory or workshop shall be deemed not to be kept in conformity with this Act” (z).

By sect. 8, “where an inspector observes in a factory that any grindstone, worked by steam, water, or other mechanical power, is in itself so faulty, or is fixed in so faulty a manner as to be likely to cause bodily injury to the grinder using the same, he shall serve on the occupier of the factory a notice requiring him to replace such faulty grindstone, or to properly fix the grindstone fixed in the faulty manner.

“The provisions of this Act with respect to the fencing of machinery which an inspector considers not to be securely fenced, and to be dangerous, shall apply in like manner as if they were re-enacted in this section, with the necessary modifications.

“Where the occupier of a factory fails to keep the grindstone mentioned in the notice or award in such a state, and fixed in such a manner as not to be dangerous, the factory

(y) See note (r), *ante*.

(z) See note (m), *ante*.

shall be deemed not to be kept in conformity with this Act" (a).

By sect. 9, "a child shall not be allowed to clean any part of the machinery in a factory while the same is in motion by the aid of steam, water, or other mechanical power.

"A young person or woman shall not be allowed to clean such part of the machinery in a factory as is mill-gearing, while the same is in motion for the purpose of propelling any part of the manufacturing machinery.

"A child, young person, or woman, shall not be allowed to work between the fixed and traversing part of any self-acting machine while the machine is in motion by the action of steam, water, or other mechanical power.

"A child, young person, or woman, allowed to clean or to work in contravention of this section shall be deemed to be employed contrary to the provisions of this Act" (b).

SECTION VII.

Corporations performing Statutory Duties.

Where a person is intrusted by statute, or charter, or prescription, with the execution of certain duties, the law demands of him that he should use something more than ordinary care in the performance of his duties. In most cases it is very reasonable that this should be so, for the person so intrusted has received from the Legislature some benefit or other which has induced him to undertake the burden of the duty; and even where this may not be so, where a statute enjoins a person to do a thing, it would be absurd to suppose that the

(a) See note (m), *ante*.

(b) The occupier of the factory is

liable to a fine under s. 83, and the parent under s. 84.

thing may be done anyhow, and yet the person not be liable, and very reasonable to suppose that the law intends that the thing shall be done with more than ordinary care.

In the execution of a duty imposed by statute, a person is bound to use his best skill and diligence (c).

He is bound not only to act *bond fide*, and to the best of his skill and judgment, but "he is bound to conduct himself in a skilful manner, and do all that any skilful person could reasonably be required to do" (d). And it seems clear that he cannot excuse himself, as in the case of a person not performing a statutory duty, by saying that he employed a competent contractor (e).

Where there is a duty imposed by statute, it does not follow that the mere fact that it is not performed is negligence. If the omission arises without any default on the part of the corporation, and the statute does not give any compensation for injuries arising from such omission, no action will lie (f).

It was for a long time doubted whether corporations could be guilty of a wrong, although they might commit a breach of contract; but it is now clearly settled that a corporation may be guilty of a trespass or a tort (g); and it has been decided that where, either by prescription, or grant, or statute a duty is imposed upon a corporation, and a matter of general and public concern is involved, the public may enforce those duties by indictment, and individuals peculiarly injured by action (h).

Where an imperative duty is imposed upon a corporation, and there is a breach of that duty, the public have remedies by indictment, mandamus, injunction, or action for the wrong

(c) *Sutton v. Clarke*, 6 Taunt. 29.
Mersey Docks v. Gibbs, L. R. 1 H. L. 93, at p. 113; 35 L. J. Ex. 225.

(d) *Jones v. Bird*, 5 B. & A. 837, per Bayley, J.

(e) *Grey v. Pullen*, 5 B. & S. 970; 34 L. J. Q. B. 265; *Hole v. Sittingbourne Ry.* 6 H. & N. 488.

(f) *Hammond v. St. Pancras*, L. R. 9 C. P. 316; 43 L. J. C. P. 157.

(g) Per Lord Ellenborough, C.J., *Yarborough v. Bank of England*, 16 East, 7.

(h) *Mayor, &c., of Lyme Regis v. Henly*, 2 Bing. N. C. 241.

done, without any allegation of negligence being necessary (*i*), but it is obvious that these matters are beyond the scope of the present work. But beyond these remedies, where there is an imperative duty imposed upon a corporation, and there is negligence in their mode of performing their duty, or negligence in omitting to perform it (*k*), then an action for negligence can be maintained against them (*k*), and it will be sufficient to show something less than ordinary negligence in order to recover damages (*l*).

Where the duty is discretionary merely, the corporation, as we have seen *ante*, Chapter II. s. 5, are not liable for omitting to do what they are not bound to do; but if they undertake to perform a duty, or to do a work which they are not bound to do, they must exercise ordinary care.

Where (as is sometimes the case) a corporation are charged with the duty of keeping its streets in repair, and of exercising a general supervision over them, they are bound to keep them free from all obstructions and defects against which due care can guard (*m*).

Where the corporation require private drains to be run into the main sewer, they are bound to take care to keep such sewer open (*n*); but where the private owners are not so required, and have not in fact so used the sewer, and have taken no means to prevent an overflow, the corporation are not liable for damage from an overflow of their sewer (*o*).

Where a railway company are bound by statute to put up a

(i) See *Hammond v. Vestry of St. Pancras*, *infra*.

(k) If there is no negligence shown in the omission the corporation are not liable. *Hammond v. St. Pancras*, 43 L. J. C. P. 157; L. R. 9 C. P. 316 (overflow of a sewer); *Dunn v. Birmingham Canal Nav.*, L. R. 8 Q. B. 42; 42 L. J. Q. B. 34 (canal overflowed into mine, lawful exercise of statutory powers no negligence), *Broughton v.*

Mid. G. W. of Ireland Co. 7 Ir. R. C. L. 169 (water turned into sewer stopped up; statutory powers, no negligence).

(l) *Campbell on Negligence*, p. 18.

(m) See *Highways*, *ante*, Ch. II. s. 4, pp. 47, 49. *Wendell v. Troy*, 39 Barb. 329, 4 Keyes 261.

(n) *Child v. Boston*, 4 Allen, 41; *Shearman*, s. 151.

(o) *Barry v. Lowell*, 8 Allen 127.

fence or gate upon a level crossing, it is negligence to omit to do so, and the company are liable for injury caused by such omission (*p*).

Where a corporation are bound by statute to fence a foot-path, they are liable for injury arising from their omission to do so (*q*).

It is not proposed to discuss all the cases in which it has been argued that the statute under which the corporation was acting, did not absolutely and imperatively demand the performance of the duty but left it to their discretion. These cases turn upon the construction to be given to the particular section of the Act, or clause of the charter, in each case (*r*).

It should be observed that the duty may be imperative as regards the public, and discretionary as regards individuals; and that words, in terms bestowing a power only, are, when the public interests require it, construed to impose an imperative duty.

The liability of the corporation must, as we have seen, be determined upon a true interpretation of the statute or charter under which they are created. If there is a duty not only to make certain works, but also to take proper care and use reasonable skill about the works so as to make them such as the statute or charter authorizes, persons injured by the negligence of the corporation to fulfil such duty may maintain an action against the corporation for negligence (*s*).

The true interpretation of such statutes is that a duty is cast upon the incorporated body not only to make the works authorized, but also to take proper care and to use reasonable skill that the works are such as the statute authorizes, or to

(*p*) *Williams v. G. W. Ry. Co.*, L. R. 9 Ex. 157; 43 L. J. Ex. 105 (child found with foot cut off; no fence). See this matter more fully treated, *post*, Ch. V., Contributory Negligence.

(*q*) *Ohrby v. Ryde Commrs.* 33 L. J. Q. B. 296.

(*r*) See the following cases: *Ohrby v. Ryde Commrs.* 33 L. J. Q. B.

296; *Wilson v. Halifax*, 37 L. J. Ex. 44; L. R. 3 Ex. 114; *Hammond v. St. Pancras*, *supra*.

(*s*) *Mersey Docks v. Gibbs*, L. R. 1 H. of L., p. 118, *per* Blackburn, J., citing *Southampton Bridge Co. v. Southampton Board*, 8 Ell. & Bl. 801, 812.

take reasonable care that they are in a fit state for the use of the public who are to use them (*t*), and from time to time to do what is necessary to prevent the recurrence of injury (*u*).

The proper rule of construction of such statutes is that, in the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same thing (*w*). A person sustaining injury through works authorized by statute is in general only able to recover if he could have recovered for the injury done apart from the statute (*x*). Care should be taken to ascertain accurately in the first place what the duties of the corporation are; for they are only liable for a neglect of *duty*, not for an injury arising from something done or omitted to be done in respect of which they have no duty (*y*).

If a corporation take toll (*z*) from the public, and invite them, expressly or impliedly, upon their premises, they are liable, like individuals, for injury arising from the defective state of the premises (*a*), and therefore, as we have seen (*b*), they also are bound to use more than ordinary care. Upon this principle railway companies who invite persons expressly or

(*t*) *Mersey Docks v. Gibbs*, *supra*, at p. 118.

(*u*) *Geddis v. Proprietors of Bann Reservoir*, L. R. 3 App. Cases, 438.

(*w*) *Mersey Docks v. Gibbs*, *supra*, at p. 110.

(*x*) *New River Co. v. Johnson*, 2 E. & E. 435.

(*y*) *Cracknell v. Thetford* (Mayor of), L. R. 4 C. P. 629; 38 L. J. C. P. 353 (Commissioners' duty to maintain navigation, no duty to clean river so as to prevent floods); and see *Hodgson v. York* (Mayor of), 28 L. T. N. S. 836; *Collins v. Mid. Level Commrs.*, L. R. 4 C. P. 279; 38 L. J. C. P. 236; *Gibson v. Preston* (Mayor of), L. R. 5 Q. B. 222; 39 L. J. Q. B.

131; *Hartnell v. Ryde Commissioners*, 4 B. & S. 361; 33 L. J. Q. B. 39; *White v. Hindley Local Board*, L. R. 10 Q. B. 219; 44 L. J. Q. B. 114.

(*z*) It is immaterial, as will be seen *infra*, whether they make on the whole a profit from the tolls, see *ante*, Ch. II. s. 6.

(*a*) *Winch v. Conservators of Thames*, L. R. 9 C. P. 378; 43 L. J. C. P. 167 (Exch. Ch.) (towing path), if they were ignorant of the defect, or gave notice to those who paid toll of the defect they would not, it seems, be liable.

(*b*) *Ante*, p. 80.

impliedly upon their premises are bound to take more than ordinary care (c).

Upon the other hand, corporations are not liable for any injury which is the *inevitable* consequence of something done in the course of their duty, but only for such injury as would not have arisen but for their own negligence (d).

Where a corporation have power to do some work for their own or the public benefit, it is their duty to see that it is carefully done, and, though under their powers they have the right to do an act which is a nuisance, they are bound to do all that they can to obviate the mischief (e).

It has been held, after many conflicting decisions, and is now settled law that corporations are liable for negligence, whether they derive any ultimate pecuniary benefit or not from the performance of the duty imposed upon them (f).

If a corporation have notice or the means of knowing (g) that the works or premises over which they have control are in a defective state, and they negligently disregard the notice or negligently omit to avail themselves of their means of knowledge, they are liable to an action of negligence for injury caused by such disregard or omission (h).

Where a corporation have a positive duty to perform it is no answer to an allegation of negligence upon their part that their officers, servants or agents were ordered to do it (i), nor that they have contracted with a competent person for the per-

(c) See s. 8, Carriers.

(d) *Whitehouse v. Fellowes*, 10 C. B. N. S. 765; 30 L. J. C. P. 305, *Ruck v. Williams*, 3 H. & N. 308; *Cracknell v. Corp. of Thetford*, L. R. 4 C. P. 629, 38 L. J. C. P. 353.

(e) *R. v. Kerrison*, 3 M. & S. 526; *Oliver v. N. E. Ry. Co.* L. R. 9 Q. B. 409; 43 L. J. Q. B. 198.

(f) *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93; 35 L. J. Ex. 225; *Coe v. Wise*, L. R. 1 Q. B. 711; 37 L. J. Q. B. 262. See also Ch. III., sect. 2, sub-s. 1, *Wharves, &c.*

(g) *Penhallow v. Mersey Docks*,

infra, *Stiles v. Cardiff Steam Nav. Co.* 33 L. J. Q. B. 310 (*scienter* as to vicious dog). *Mersey Docks v. Gibbs*, *supra*.

(h) *Penhallow v. Mersey Docks*, 30 L. J. Ex. 329, Ex. Ch. L. R. 1 H. L. 93; 35 L. J. Ex. 225; *Parnaby v. Lancaster Canal Co.* 11 Ad. & E. 223; *Mersey Docks v. Gibbs*, *supra*; and see *Hammond v. St. Pancras Vestry*, *supra*, p. 97. See also *Shearman*, s. 407.

(i) *Scott v. Manchester*, 2 H. & N. 204.

formance of such duty (*k*), but if they go farther and show that the work was done in a competent manner, and that the injury was caused by an accident or *vis major* they are excused (*l*).

In order to render a corporation liable for negligence the persons doing the negligent act must be appointed and removable by the corporation (*m*) and subject to the control of the corporation (*n*).

But a corporation may render themselves liable for the acts of persons to whom they have given authority to do the particular act in respect of which negligence is alleged, or if they subsequently adopt such act (*o*).

Sometimes a corporation are bound by statute to employ a particular person to do particular acts, and who, although in some sense employed by the corporation, is in fact independent of their control, and acting under other authority. If that be so, of course the corporation are not liable, but as in the ordinary case of master and servant the difficulty is one of fact whether the person so acting is the servant of the corporation or not (*p*).

Although in the execution of a statutory duty corporations cannot shelter themselves under the person whom they have employed to perform that duty, yet they are not liable, as it would seem, for a mere error of judgment by such person, if they have taken care to select a person of skill. Thus if a corporation assent to a particular mode being adopted in executing a work, whether such mode is suggested by means of plans or otherwise, they are not liable, if they have taken due care to obtain skilful advice on the matter (*q*). The

(*k*) *Grote v. Chester and Holyhead Ry. Co.* 2 Ex. 251. As explained in *Francis v. Cockerell*, L. R. 5 Q. B. 501; 39 L. J. Q. B. 291. See *Shearman*, s. 373 *et seq.*, and see *infra*.

(*l*) *Grote v. Chester and Holyhead Ry.*, *supra*; *G. W. Ry. of Canada v. Fawcett*, 1 Moo. P. C. N. S. 101.

(*m*) *Schinotti v. Bumstead*, 6 T. R. 646.

(*n*) *Scott v. Manchester*, *supra*, p. 100.

(*o*) *Smith v. Birmingham Gas Co.* 1 A. & E. 526.

(*p*) *Shearman*, s. 138.

(*q*) *Sutton v. Clarke*, 6 Taunt. 29.

truth is in such cases there is no negligence in fact in any one, none in the selection of the mode, and none in the execution. If there is no negligence in the servant, there is none in the master, if the servant is properly selected. But if the plan be negligently carried out, then the employers of such negligent servants are liable, although the plan might be good enough (*r*).

In the case of *Ruck v. Williams*, it appears that commissioners had omitted to put up a flap at the mouth of a sewer which had been in use there before. The specification did not mention the flap, except that it said that the new sewer must be "made tight." The contractor supposed he had done his duty by puddling the mouth of the sewer. It was held that the commissioners were liable (*s*).

Where a corporation employ an independent contractor to execute work, which it is the statutory duty of the corporation to perform, the corporation are liable for injuries which arise as a natural consequence of the work ordered to be done having been done without proper safeguards; but they are not liable for the incidental negligence of the contractor and his servants during the process of carrying out such work, the mode of doing which is no part of the order of the corporation (*t*).

Where a corporation have been sued and have paid damages by reason of the contractor's negligence in executing the work, they can recover against him, if his contract with them expressly or impliedly bound him to see that such negligence should not occur (*u*); but such a stipulation does not exonerate

(*r*) See *Grote v. Chester and Holyhead Ry. Co.* 2 Exch. 251, as explained in *Francis v. Cockerell*, L. R. 5 Q. B. pp. 184, 501. See *Thome v. London (Mayor of)*, L. R. 9 Ex. 163; 43 L. J. Ex. 115.

(*s*) *Ruck v. Williams*, 3 H. & N. 808, 310.

(*t*) *Gray v. Pullen*, 5 B. & S. 970;

34 L. J. Q. B. 265; *Shearman*, s. 142, Wharton 279; *Hill v. New River Company*, 9 B. & S. 303; *Bower v. Peate*, L. R. 1 Q. B. D. 321; 45 L. J. Q. B. 446; *Hole v. The Sittingbourne Ry. Co.*, 6 N. & N. 488; 30 L. J. Ex. 81.

(*u*) *Shearman*, s. 142, 419.

the corporation in the first instance (*x*), unless, perhaps (*y*), if they made it absolutely part of the work to be done by the contract that a particular thing should be done, which, if done, would render the whole work a perfectly harmless work, and such thing was not done.

A corporation erected baths and washhouses under 9 & 10 Vict. c. 74. The affairs of the baths, &c., were conducted by a committee, consisting of some of the members of the corporation. The plaintiff was injured by reason of the improper construction of a drying machine, and it was held the corporation was the proper party to be sued (*z*).

The party bringing an action of negligence for the breach of a statutory duty must show that the duty was imposed for his benefit, and that he has an interest in its due performance (*a*).

Where a public statute orders the performance of a duty towards a class of persons under a penalty, and an individual is injured by the neglect of the corporation, the mere fact of the penalty does not prevent the action for the private damage, but the whole scope of the Act must be looked at to see whether it was intended that the penalty was intended to be the only punishment for the breach of duty (*b*).

SECTION VIII.

Carriers.

With the liability of a common carrier as a sort of insurer this book has nothing to do. He is in that capacity liable in

(*x*) *Bower v. Peate*, *supra*.

(*y*) See the judgment of the Court in *Bower v. Peate*, *supra*.

(*z*) *Cowley v. Sunderland*, 6 H. & N. 565; 30 L. J. Ex. 127.

(*a*) *Strong v. Campbell*, 11 Barb. 185.

(*b*) It is submitted that this is all

that can be collected from a comparison of the following cases:—*Couch v. Steel*, 3 E. & B. 402; *Atkinson v. Newcastle Waterworks Co.*, C. A. L. R. 2 Ex. Div. 441; 46 L. J. Ex. 775; *Blamires v. Lancashire & Yorkshire Ry. Co.*, L. R. 8 Ex. 283; 42 L. J. Ex. 182.

any event, except the act of God (*c*) or the Queen's enemies, unless where the goods are in their nature liable to extraordinary risks, and are injured in consequence of such peculiar character, for then the common carrier becomes liable only where he has been negligent (*d*).

So, also, a common carrier is not an insurer after the goods have arrived at their destination. He then becomes liable only where negligence is shown (*e*).

Railway companies are, apart from statute law or special contract, common carriers, and subject to the like duties and privileges with ordinary common carriers (*f*), but further they are bound to carry for all persons upon equal terms (*g*), as well as upon reasonable terms.

Carriers have been relieved by the Legislature in some degree from the extremely onerous obligations cast upon them by the common law; and by the Carriers Act, 1830, it is declared that they shall not be liable for the loss of or injury to certain goods above the value of £10, unless their value be declared and an increased charge paid. Section 1 of the Carriers Act, 1830, provides as follows:—"That from and after the passing of this Act no mail contractor, stage-coach proprietor, or other common carrier by land

(*c*) As to what is the act of God, see *Nugent v. Smith*, L. R. 1 C. P. D. 423; 45 L. J. C. P. 697. And in what cases it will excuse an act, see *ante*, Ch. I, Proximate Cause, p. 13, note.

(*d*) *Blower v. G. W. Ry. Co.*, L. R. 7 C. P. 655 (animals by land); *Kendal v. L. & S. W. Ry. Co.*, L. R. 7 Ex. 373; 41 L. J. Ex. 184; *Nugent v. Smith*, *supra* (animals by sea); *McDonald v. Highland Ry. Co.*, Court of Session, 3rd series, vol. xi. 614 (perishable goods).

(*e*) *Garside v. Trent Navigation*, 4 T. R. 581; *Bourne v. Gatcliffe*, 3 M. & G. 643; 11 Cl. & Fin. 45; *Crouch v. Gt. W. Ry. Co.*, 27 L. J. Ex. 345; *Heugh v. L. & N. W. Ry. Co.*, L. R. 5 Ex. 51; *Mitchell v. L. & Y. Ry. Co.*, L. R. 10 Q. B. 256;

44 L. J. Q. B. 107. As to goods by sea see *Wilson v. London, &c., Co.*, L. R. 1 C. P. 61; 25 & 26 Vict. c. 63, s. 67. As to when the *transitus* is at an end and the carrier ceases to hold the goods as carrier, but holds them as agent of the consignee, see *In re McLaren*, 48 L. J. Bk. (C. A.) 49. By special agreement, of course, the carrier may be agent for the consignee and not for the consignor.

(*f*) Railway Clauses Act, 1845, s. 89, but their duties are in many respects regulated by the Railway Commissioners under the Regulation of Railways Act, 1873.

(*g*) *Parker v. Gt. Western*, 7 M. & G. 253; *Baxendale v. East. Co. Ry. Co.*, 4 C. B. N. S. 63; *Piddington v. S. E. Ry. Co.*, 5 C. B. N. S. 111.

for hire, shall be liable for the loss of, or injury to, any article or articles or property of the descriptions following (that is to say), gold or silver coin of this realm, or of any foreign State, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, notes of the governor and company of the Bank of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace [by 28 & 29 Vict. c. 94, this does not include machine-made lace], or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such article or articles or property aforesaid, contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house, of such mail-contractor, stage-coach proprietor or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." The Act applies only where the loss takes place upon land (*h*).

(*h*) *Le Conteur v. London, Brighton and South Coast Ry. Co.*, 35 L. J. Q. B. 40; *L. R.* 1 Q. B. 54; *Baxendale v. Great East. Ry. Co.*, 4 Q. B. 244; 38 L. J. Q. B. 137. As to what

is a loss, see *Hearn v. London and S. W. Ry. Co.*, 10 Exch. 793; *Wallace v. Dublin, &c. Ry. Co.*, 8 Ir. Rep. C. L. 341; *Pianciani v. London and S. W. Ry. Co.*, 18 C. B. 226.

The Act protects the carrier, notwithstanding the goods are being carried beyond their destination (*i*).

It is not necessary that the declaration of value should be in any particular form (*k*). The declaration being made, the customer has done his duty, and if the carrier then chooses not to demand the higher rate he may do so, and his liability rests as at common law (*l*). Section 2 provides that an increased rate may be demanded, and notices are to be put up in offices or warehouses by which customers are to be bound. Section 3 provides that carriers are to give receipts for such extra charges. By section 4 public notices are not to limit the common law liability of the carrier in respect of any other goods. Section 5 defines a receiving-house. Section 6 saves all special contracts; but it has been held that the mere fact of the existence of a special contract not inconsistent with the provisions of section 1 does not prevent the operation of that section (*m*). By section 7 the extra charges may be recovered with the damages. By section 8 "nothing in this Act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles

(*i*) *Morrit v. N. East. Ry. Co.*, L. R. 1 Q. B. D. 302, 45 L. J. Q. B. 289, C. A. As to what goods are within the section the following cases may be consulted. They are taken in the order in which the words interpreted by them occur in the Act:—*Le Conteur v. London and S. W. Ry. Co.*, *supra*, ("timepieces"); *Bernstein v. Baxendale*, 28 L. J. C. P. 265 ("trinkets"); *Stoessiger v. S. East. Ry. Co.*, 3 E. & B. 549, ("bills, notes, or securities for payment of money"); *Wyld v. Pickford*, 8 M. & W. 443 ("maps"); *Boys v. Pink*, 8 C. & P. 361 ("engravings"); *Anderson v. London and N. West. Ry. Co.*, 39 L. J. Ex. 55, L. R. 5 Ex. 90 ("pictures"—frame); *Owen v. Burnett*, *supra* ("glass," large looking-glass); *Hart v. Baxendale*, 20 L. J. Ex. 338;

Bernstein v. Baxendale, *supra*; *Brunt v. Midland Ry. Co.* 33 L. J. Ex. 187; *Flowers v. S. East. Ry. Co.*, 16 L. T. 339 ("silks, &c."); *Mayhew v. Nelson*, 6 C. & P. 58 ("furs"); *Treadwin v. Great Eastern Ry. Co.*, L. R. 3 C. P. 308 ("lace," and see 28 & 29 Vict. c. 94, *ante*, p. 105); the plaintiff's own waggon placed upon a railway truck was held to be a "parcel or package," where goods within the Act were packed in the waggon, *Whaite v. Lancashire and Yorks Ry. Co.*, 43 L. J. Ex. 47; L. R. 9 Ex. 67.

(*k*) *Bradbury v. Sutton*, 19 W. R. 800, 21 W. R. 128.

(*l*) *Behrens v. Great Northern Ry. Co.*, 31 L. J. Ex. 299.

(*m*) *Baxendale v. Great East. Ry. Co.*, L. R. 4 Q. B. 244; 38 L. J. Q. B. 137.

whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct" (n).

If the customer tenders a reasonable sum for the carriage of goods, it has been thought that the carrier cannot refuse to carry them (o). He has no right to say that he will not carry them except under a special contract, however reasonable; at all events, where the goods are such as he professes to carry (p).

In dealing with the question of the liabilities of carriers, it must be understood that their liabilities might always be varied by express agreement, and that it is not our intention,

(n) As to who is a servant within the meaning of this section, see *Machu v. London and S. W. Ry. Co.*, 2 Exch. 415. It is unnecessary in a case where the statute is relied on to prove negligence if felony be proved, *Great W. Ry. Co. v. Rimmell*, 18 C. B. 575, 27 L. J. C. P. 201; *Metcalf v. London, Brighton and South Coast Ry. Co.*, *ib.* 205. As to what is sufficient evidence of a felony, see *Boyce v. Chapman*, 2 Bing. N. C. 222; *Great Western Ry. Co. v. Rimmell*, *supra*; *Metcalf v. London, Brighton and South Coast*, *supra*; *Vaughton v. London and N. W. Ry. Co.*, L. R. 9 Ex. 93; 43 L. J. Ex. 75; *McQueen v. Great West. Ry. Co.*, L. R. 10 Q. B. 569; 44 L. J. Q. B. 130.

(o) And even being ready and willing to pay is sufficient, see *Pickford v. Grand Junction Ry. Co.*, 8 M. & W. 372.

(p) *Per Parke, B.*, in *Carr v. London and York Ry. Co.*, 7 Exch. 707, and see the same Judge in *Johnson v. Midland Ry. Co.*, 4 Exch. 367: I cannot find that any action has ever been brought on the strength of this dictum. The above case was tried in 1852, and the Railway and Canal Traffic Act allowing reasonable contracts was passed in 1854, and probably it would now be held that a carrier had a

right to demand that a reasonable special contract should be made; and this has been evidently assumed in several cases. *Horn v. Midland Ry. Co.*, 42 L. J. C. P. 59, L. R. 8 C. P. 131. Railway companies may, by notice, refuse to carry animals except by special contract, *Richardson v. N. E. Ry. Co.*, L. R. 7 C. P. 80. Drivers of cattle sometimes agree to travel at their own risk, *McCawley v. Furness Ry. Co.*, L. R. 8 Q. B. 57, 42 L. J. Q. B. 4; *Gallin v. London and N. W. Ry. Co.*, L. R. 10 Q. B. 212, 44 L. J. Q. B. 89; *Hall v. N. E. Ry. Co.*, L. R. 10 Q. B. 434, 44 L. J. Q. B. 164. See, however, *Munster v. S. E. Ry. Co.*, 4 C. B. N. S. 676; 27 L. J. C. P. 308, which was a case of a passenger offering bundles to be carried. The company made a rule that passengers were to see their luggage labelled, and a rule that porters were not to label bundles, and they refused to carry the bundles. It was held they were bound to carry such bundles as were personal luggage. It was said that they could not so limit their common law liability; but the Court seemed to entertain doubt. See p. 697 of the report as to whether they could not refuse to carry bundles which were not personal luggage.

privileges, or liabilities of any such company under the said Act of the eleventh George Fourth and first William Fourth, chapter sixty-eight, with respect to articles of the descriptions mentioned in the said Act."

Where an injury happened before the special contract under the section could be made, it was held that the owner could recover the limited sum, for the section protects the carrier during the receiving as well as when the relation of carrier and customer is established (*y*).

A suggestion has been made that notwithstanding the section (*z*), a carrier of goods above £10 undeclared would be liable for *gross* negligence (*a*), but that is clearly not the law (*b*).

The measure of damages is the value of the goods at the place and at the time of delivery (*c*). Where special circumstances under which a contract is made are known to both parties, the carrier is liable for the loss which would ordinarily flow from those circumstances (*d*), but not for a loss which could not fairly be contemplated by the parties, such as general loss of business, or profits or wages (*e*). The notice of the special circumstances in many cases leads to the inference that the carrier undertook to be responsible for the special damages; but, of course, that inference does not arise

(*y*) *Hodyman v. West Mid. Ry. Co.*, 33 L. J. Q. B. 233, aff. 35 L. J. Q. B. 85 (horse kicking girder).

(*z*) S. 1, p. 104.

(*a*) *Owen v. Burnett*, 2 Cr. & M. 353, *per* Vaughan, B.

(*b*) *Hinton v. Dibbin*, 2 Q. B. 646.

(*c*) *O'Hanlan v. G. W. Ry. Co.*, 34 L. J. Q. B. 154; 13 W. R. 741; *Rice v. Baxendale*, 30 L. J. Ex. 371. Thus the carrier is liable for the falling of prices; *Wilson v. L. & Y. Ry. Co.*, 30 L. J. C. P. 232; *Borries v. Hutchinson*, 34 L. J. C. P. 169; *Williams v. Reynolds*, *ib.*, Q. B. 221; *Lord v. Mid. Ry. Co.*, 36 L. J. C. P. 170; *Collard v. S. E. Ry. Co.*, 30 L. J.

Ex. 393; *Simpson v. L. & N. W. Ry. Co.*, 45 L. J. Q. B. 182 (profit which might have been made at a particular show).

(*d*) *Hadley v. Baxendale*, 9 Exch. 341; *Hales v. L. & N. W. Ry. Co.*, 32 L. J. Q. B. 292; *Woodger v. Gt. W. Ry. Co.*, 36 L. J. C. P. 177; *Corry v. Thames Iron Works*, 37 L. J. Q. B. 68.

(*e*) *Crouch v. G. N. Ry. Co.*, 11 Exch. 742; *Le Peinture v. S. E. Ry. Co.*, 2 L. T. 170; *Gee v. L. & Y. Ry. Co.*, 30 L. J. Ex. 11; *Horne v. Mid. Ry. Co.*, L. R. 8 C. P. 131; 42 L. J. C. P. 59 (boots for the French army, cessation of war).

where the damages are not such as might be expected to flow from the circumstances (*f*).

Both the above-mentioned statutes apply to passengers' luggage (*g*).

Railway companies are, it would seem, apart from the statute or special contract, insurers of passengers' luggage which they have taken under their control (*h*). The quantity of luggage which a passenger is allowed to take with him, without any extra charge being made, is regulated by the private Act of the particular company; but when a passenger takes an ordinary ticket for himself, he is paying a part of the price for the luggage he is taking with him (*i*).

It was held in one case that a passenger might agree that the luggage should be carried at his own risk (*k*), but it has been decided that the 7th section of the Railway and Canal Traffic Act applies, and that the company are liable (*l*), notwithstanding such agreement. In *Rumsey v. N. E. Ry. Co.*, the plaintiff took an excursion ticket, the condition being that no luggage should be taken; and he, in fraud of the company, took his portmanteau with him, and it was held that the company had a lien upon the portmanteau for the extra charge which the plaintiff would have paid in taking an ordinary ticket. Here the company had not undertaken

(*f*) See *per* Blackburn, J., in *Horne v. Mid. Ry. Co.*, 42 L. J. C. P. 59; L. R. 8 C. P. 131.

(*g*) *Cohen v. S. E. Ry. Co.*, L. R. 1 Ex. D. 217; 45 L. J. Ex. 298; *infra*, in C. A.

(*h*) *Macrow v. G. W. Ry. Co.*, L. R. 6 Q. B. 612; *Cohen v. S. E. Ry. Co.*, L. R. 1 Ex. D. 217; 2 Ex. D. 253; 46 L. J. Ex. 413, C. A. This is not expressly decided in the Court of Appeal, but the case of *Stewart v. L. & N. W. Ry. Co.*, in which the contrary was suggested, is overruled.

(*i*) *Cohen v. S. E. Ry. Co.*, *supra*. As to what is "passengers' luggage,"

see *Gt. N. Ry. Co. v. Shepherd*, 8 Exch. 30; *Cahill v. L. & N. W. Ry. Co.*, 10 C. B. N. S. 154; 31 L. J. C. P. 271; *Keys v. Belfast Ry. Co.*, 9 H. L. C. 556; *Phelps v. L. & N. W. Ry. Co.*, 34 L. J. C. P. 259; *Hudston v. Mid. Ry. Co.*, L. R. 4 Q. B. 366; 38 L. J. Q. B. 213 (child's rocking-horse); *Macrow v. G. W. Ry. Co.*, *supra* (linen).

(*k*) *Stewart v. L. & N. W. Ry. Co.*, 33 L. J. Ex. 199 (excursion train).

(*l*) *Cohen v. S. E. Ry. Co.*, *supra*. A passenger may agree to travel at his own risk, because the Railway Act only applies to goods, see *post*.

to carry the plaintiff's portmanteau at all under the circumstances (*m*).

When a passenger retains his own personal control over his own luggage the company are no longer insurers of its safety, but are liable only where negligence upon their part is proved (*n*).

The company's liability extends to the receiving and delivering of the passengers' luggage to and from the carriage in which the passenger arrives or departs (*o*). If the passenger gives special directions as to labelling, &c., to a servant of the company, who thereupon undertakes the charge, the company are answerable for its safety (*p*), notwithstanding a notice to the effect that luggage must be left at the cloak-room (*q*).

As warehousemen of luggage, railway companies are in a different position from that in which the law places them, whilst they exercise their duties as carriers. In the absence of any condition limiting their liability, they are liable (to the extent of the injury done) for ordinary negligence, as in the case of an ordinary bailee for reward (*r*). With respect to passengers' luggage deposited in a cloak-room, the railway companies always endeavour to attach special conditions to this contract of bailment. The conditions must be reasonably shown to be present to the mind of the passenger. If the jury think

(*m*) *Rumsey v. N. E. Ry. Co.*, 32 L. J. C. P. 244. That railway companies have a lien upon luggage for unpaid fares, see *Wolf v. Summers*, 2 Camp. 631; *Wallis v. L. & S. W. Ry. Co.*, L. R. 5 Ex. 62; 39 L. J. Ex. 57.

(*n*) *Talley v. G. W. Ry. Co.*, L. R. 6 C. P. 44; 40 L. J. C. P. 9. The mere fact of the luggage being placed by a porter in the carriage with the passenger does not show that the passenger has reassumed his control; see *Richards v. L. B. & S. C. Ry. Co.*, 7 C. B. 839; see also *Kent v. Mid. Ry. Co.*, L. R. 10 Q. B. 1; 44 L. J. Q. B. 18 (changing from one station to another luggage not taken into control of second company, passenger

booked through; see *Mid. Ry. Co. v. Bromley*, 17 C. B. 372, where passenger had not booked through). Where luggage is received by the company as the luggage of the servant, but it turns out to be his master's, who is following by another train, the company are not liable for the loss; *Beecher v. G. E. Ry. Co.*, L. R. 5 Q. B. 241; 39 L. J. Q. B. 122.

(*o*) *Agrell v. L. & N. W. Ry. Co.*, 34 L. T. 134; *Richards v. L. B. & S. C. Ry. Co.*, 7 C. B. 839; *Butcher v. L. & S. W. Ry. Co.*, 16 C. B. 13.

(*p*) *Agrell v. L. & N. W. Ry. Co.*, *supra*.

(*q*) *Lovell v. L. C. & D. Ry. Co.*, 45 L. J. Q. B. 476.

(*r*) *Ante*, p. 20.

that the passenger had not reasonable notice that there were any conditions in existence he would not be bound, but if he had reasonable notice of the existence of such conditions, and did not choose to read them, he would be bound (*s*).

Carriers of passengers are not insurers, but are only liable where negligence is proved (*t*). It seems that the driver of a stage-coach ought to inform the passengers of any danger of the road, so that they may have the option of alighting (*u*).

The duty of railway companies, as carriers of passengers, is to take due care (including in that term the use of skill and foresight) (*v*), and they seem bound to take more than ordinary care by reason of the danger to which passengers are exposed in travelling at a great speed, and without any power to avoid or mitigate any danger which may arise.

This duty arises out of the contract to carry between themselves and the passenger, and is superadded by the law to the contract. The passenger, upon being injured by the breach of this duty, may elect to sue in the form of tort or of contract, but the foundation of the action is the contract (*x*).

This contract seems to be made by the fact of the passenger being lawfully within the carriage, and it is immaterial whether he himself negotiated the contract or paid the fare (*y*).

But, where a servant has taken a railway ticket for himself and sustains injuries by reason of the company's

(*s*) *Parker v. S. E. Ry. Co.*, L. R. 2 C. P. D. 416 C. A.; 46 L. J. C. P. 768; *Henderson v. Stevenson*, L. R. 2 Sc. App. 470 (ticket, on face "see back"). The defendant was acting in his capacity as carrier, not warehouseman in this case; *Harris v. Gt. W. Ry. Co.*, L. R. 1 Q. B. D. 515; 45 L. J. Q. B. 729 (ticket, on face "subject to conditions on other side"). In both the above cases the plaintiff knew there was writing on the back, but did not know or believe there were any conditions, and he was held not bound; but see the recent case of *Burke v. S. E. Ry. Co.*, 49 L. J. C. P. 107; L. R. 5 Ex. D.

(*t*) *Redhead v. Mid. Ry. Co.* L. R.

4 Q. B. 379; 38 L. J. Q. B. 169; Ex. Ch. *Harris v. Costar*, 1 C. & P. 636; *White v. Boulton, Peake*, 81; *Christie v. Griggs*, 2 Campbell, 79; *Crofts v. Waterhouse*, 11 Bing. 319 (stage coaches).

(*u*) *Dudley v. Smith*, 1 Camp. 167.

(*v*) *Redhead v. Mid. Ry. Co.*, *supra*.

(*x*) *Alton v. Mid. Ry. Co.*, 34 L. J. C. P. 292; 19 C. B. N. S. 213.

(*y*) *Marshall v. Y. & N. Ry. Co.*, 11 C. B. 655 (master took ticket for servant); *Austin v. G. W. Ry. Co.*, L. R. 2 Q. B. 442; 36 L. J. Q. B. 201 (mother took child over age without ticket).

negligence, the master cannot sue, because the tort arises out of a contract to which the master is not a party, and there is no duty towards the master (*z*); but, *quære*, whether the master could sue if he had taken the ticket himself. But where the servant who has taken a ticket from one company has been injured by the negligence of another company with whom neither master nor servant has contracted, the master may sue (*a*).

It must be owned that it is not easy to see why, in justice, the railway company in *Alton v. Midland Railway Company* were less liable because they had contracted to carry safely, than if they had not contracted. It seems, however, to follow logically enough if the distinction between contracts and torts where a duty is undertaken is to be maintained. This question has received further illustration from two recent cases. In *Fleming v. The Manchester, Sheffield, and Lincolnshire Railway Company* (*b*), which was an action for "not safely and securely carrying" goods, it was held that the action was substantially founded in contract within the meaning of the County Court Act (*c*), so that the plaintiff having accepted £12 paid into court, was not entitled to costs. In *Foulkes v. Metropolitan District Railway Company* (*d*), however, the plaintiff, on alighting from one of the defendants' carriages, was injured by reason of the carriage being unsuited to the platform. Grove, J., thought that "the defendants having invited or knowingly permitted the plaintiff to enter their carriage, by that alone undertook to carry him safely, and that they had also invited him by putting up a notice and by other circumstances, that they were therefore bound to keep their carriages and means of descent in a reasonable and proper state of safety, and that the mere fact

(*z*) *Alton v. Mid. Ry. Co.*, *supra*.
 (*a*) *Berringer v. Gt. East. Ry. Co.*,
 48 L. J. C. P. 400. Lopes, J.
 (*b*) *Fleming v. M. S. & L. Ry. Co.*,
 L. R. 4 Q. B. D. 81 C. A. ; *Tatton v.*
G. W. Ry. Co., 2 E. & E. 844, must

be considered overruled by this case.

(*c*) 30 & 31 Vict. c. 142, s. 5.

(*d*) *Foulkes v. Met. Dist. Ry. Co.*,
 L. R. 4 C. P. D. 267 ; 48 L. J. C. P. 555.
 See case in Court of Appeal, March 9,
 1880. See Add.

that the ticket was issued by the South Western Railway Company, which, in the absence of anything else, might be evidence of a contract on which the jury ought to act, does not necessarily exempt the defendants from any contract, if a contract is needed in the case ; but, at all events, does not exempt them from the liability which they undertake when they receive a person into a carriage which is under their control." The learned judge cites the case of *Marshall v. York, Newcastle and Berwick Railway Company* (e), and the expression used by Jervis, C.J. : " Upon what principle does the action lie at the suit of the servant (who had taken no ticket) for his personal suffering ? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely." Williams, J., in that case said that " an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carriers." In *Austin v. Great Western Railway Company* (f), which was a case where a woman took a ticket for herself, but *bonâ fide* omitted to take one for her child, over age, who was injured, Cockburn, C.J., Lush and Shee, JJ., rested their judgments on the contract being entire to carry both mother and child ; but Blackburn, J., rested the case on the fact of the child being a passenger, which raised the implied duty to carry him safely. It must be owned that the cases are conflicting ; but they may possibly be explained upon the ground that when the parties have entered into a contract with respect to the duty to be undertaken, they, in substance, intend to rely upon the contract and the incidental duties which the law superadds ; but if the parties have not entered into any agreement upon the matter, their original duties remain unvaried, and a breach of such duties is a tort. But, if this be so, it seems that great injustice may be done. Practically, a passenger is bound to take a ticket, that is, to make a contract. If, therefore, he is injured, but not beyond

(e) *Supra.*(f) *Austin v. Great Western Ry.*

Co. L. R. 2 Q. B. 442 ; 36 L. J. Q. B. 201.

£20, he cannot recover costs, notwithstanding he brings his action in "tort," for in substance it is "contract," whereas if he did not take a ticket (*bond fide* without fraud), he might recover damages and costs.

The payment of any money by the plaintiff to the defendant is not an essential part of the contract to carry, out of which the duty arises (*e*).

A railway passenger may agree to travel at his own risk, and so exclude the question of negligence (*f*).

In actions by passengers for injuries sustained in a collision, the question has frequently been raised whether the defendants are liable in consequence of the persons proximately causing the injury not being their servants or under their control. These questions arise where another company has running powers over the defendants' line, or the defendants have running powers over theirs (*g*).

A railway company may be negligent either in respect of its duties as owner of the line, or of the carriage, or of both, or in respect of its user of them as a carrier. Where the accident arises from negligence in the defendants as owners of the line or carriage, there is not much difficulty; but where the injury arises from negligence in the defendants in respect of their duty as carriers, the question becomes one of considerable difficulty; for as carriers they may be using the line or the carriage of another company, and they have undertaken a duty towards the plaintiff by contracting to carry him, to see that he is carried carefully as regards the other company as well as themselves. On the other hand, they cannot be expected to be answerable for the negligence of the other company over whose line, carriages and servants, they have, perhaps, no control. It seems that their duty really is to do their best to be

(*e*) *Marshall v. Y. & Newcastle Ry. Co.*, 11 C. B. 655; *G. N. Ry. Co. v. Harrison*, 10 Exch. 376 (newspaper reporter travelling free). *Austin v. G. W. Ry. Co.* L. R. 2 Q. B. 442; 36 L. J. Y. B. 201 (child travelling

free).

(*f*) *Macaulay v. Furness Ry. Co.*, 42 L. J. Q. B. 4; L. R. 8 Q. B. 57.

(*g*) *Wright v. Midland Ry. Co.*, L. R. 8 Ex. 137; 42 L. J. Ex. 89.

careful as regards themselves and as regards the other company, but that they are not answerable for the negligent acts of the other company against which they could not guard, any more than they are for the negligent acts of strangers (*h*).

Use of Premises.

With respect to the use by railway companies of their premises, in their capacity as carriers (*i*), it has in some cases been held that there was no negligence and in others that there was, and it is difficult to extract from them any principle whatever; and in truth it is obvious that each case must mainly depend upon its own peculiar circumstances (*k*). It may perhaps be gathered that in general where an accident happens by reason of something unusual being done at that moment (*l*) by the company there has been negligence; but

(*h*) *Blake v. Gt. W. Ry. Co.*, 7 H. & N. 987; 31 L. J. Ex. 346 (locomotive engine left on line by other company); *Thomas v. Rhymney Ry. Co.*, L. R. 6 Q. B. 266; 40 L. J. Q. B. 89 (train in the way of defendants' train on the line); *Wright v. Midland Ry. Co.*, 41 L. J. Q. B. 89; L. R. 8 Ex. 137 (train of Midland run into by train of another company); *Birkett v. Whitehaven Junction Ry. Co.*, 4 H. & N. 730; 28 L. J. Ex. 348 (defect in switch in Maryport Ry.); *Buxton v. N. E. Ry. Co.*, L. R. 3 Q. B. 549; 37 L. J. Q. B. 258 (cattle on line of another company).

(*i*) The question of the use by them of their premises not in their capacity as carriers, but as corporations using their property, naturally arranges itself under the head of "Corporations," or of "Owners of Property." See pp. 97, 99, 80, 82.

(*k*) See *per Kelly, C.B.*, in *Rose v. N. E. Ry. Co.*, 34 L. T. 763, *per Coleridge, C.J.*, in *Robson v. N. E. Ry. Co.*, L. R. 2 Q. B. D. 85; 46 L. J. Q. B. 50, C. A.

(*l*) *Sheppard v. Mid. Ry. Co.*, 25 L. T. 879; 20 W. R. 705 (ice on platform); *Nicholson v. L. & Y. Ry.*

Co., 34 L. J. Ex. 84, 3 H. & C. 534 (hamper taken from train and placed by side of line); *Crafter v. Met. Ry. Co.*, L. R. 1 C. P. 300; 35 L. J. C. P. 132 (slipping on steps nosed with brass; see also *Davis v. L. B. & S. C. Ry.*, 2 F. & F. 588); *Hogan v. S. E. Ry. Co.*, 28 L. T. C. P. 271 (overcrowded platform); *Jackson v. Metropolitan Ry. Co.*, L. R. 10 C. P. 49; 44 L. J. C. P. 83 (overcrowded platform, insufficient porters); overruled on appeal, L. R. 3 App. Cas. 193; see also *Wilkinson v. Fairie*, 32 L. J. Ex. 73 (carman went into dark passage and fell down staircase, a different thing from a hole or trapdoor). In *Watkins v. G. W. Ry. Co.* 46 L. J. 817, two learned judges, Denman, J., and Lopes, J., differed as to whether there was any evidence of negligence in placing a plank across a staircase so as to catch the head of a passenger descending. It would seem the question ought to have been left to the jury as well as the question of contributory negligence. There was the fact of an unusual state of the premises arguing negligence on the part of defendants, and there was evidence that the plaintiff was so careless as

where an accident happens in the usual and every-day course of events (*n*), and there has been nothing done by the company varying that course (*o*), which course has existed for some time and from which no accident has happened, then the presumption is that there is no negligence on the part of the company, but either the injury is a pure accident, or the plaintiff has only himself to blame.

Where a plank and roll of zinc fell upon a passenger through a roof upon which a man was moving about for the purpose of seeing to repairs, it was held, in the absence of any evidence to show that the man was negligent, or that the defendants knew, or had the means of knowing that the roof was insecure, there was no evidence of negligence at all (*p*).

Railway companies, either expressly or impliedly, invite persons, who are intending travellers (*q*), upon their premises and into their carriages, and in so doing put them off their guard by a sort of warranty of safety; and they are, therefore, bound to use towards such persons something more than ordinary care; and there seems to be in the case of railway

not to look where she was going, and her own negligence may have been the proximate cause. There does not appear to have been any appeal in this case; see also *Abbott v. Freeman*, 35 L. T. N. S. 783, reversing 34 L. T. N. S. 514 (horse being shown at Aldridge's kicked the plaintiff). So too railway companies ought to guard against unusual crowds of which they have notice, such as those occasioned by excursion trains; *Hogan v. S. E. Ry. Co.*, 28 L. T. N. S. 271 (person pushed off platform by uncontrolled crowd).

(*n*) *Cornman v. East. Co. Ry. Co.*, 29 L. J. Ex. 94; *Blackman v. L. B. & S. C. Ry.*, 17 W. R. 769 (weighing machine in usual place); *Crafter v. Met. Ry. Ry. Co.*, 35 L. J. C. P. 132 (brass bound steps worn smooth); *Daniel v. Met. Ry. Co.*, L. R. 5 H. L. 45 (girder falling—Lord Hatherley remarks the workmen employed had never known an accident before this

time); *Owen v. G. W. Ry. Co.*, 46 L. J. Q. B. 486, *per* Lush, J. (market train, as usual, too long to pull up at platform, unusual accident); *Toomey v. L. B. & S. C. Ry. Co.*, 27 L. J. C. P. 39; 3 C. B. M. S. 146 (urinal and lamp room close together, plaintiff injured by going into latter by mistake); *Gt. W. Ry. Co. v. Davies*, 39 L. T. N. S. 475 (cow injured by insufficiency of catch to gate on level crossing which had been safely used for nine years); see also *Patchell v. Irish N. W. Ry. Co.*, 6 Ir. R. C. L. 117.

(*o*) See, *post*, as to "Presumption."

(*p*) *Welfare v. L. B. & S. C. Ry. Co.*, L. R. 4 Q. B. 693; 38 L. J. Q. B. 241. As to having the means of knowing whether things are in a safe condition or not, see *Withers v. North Kent Ry.*, 27 L. J. Ex. 417.

(*q*) And even those accompanying passengers to see them off (I suppose reasonably doing so).

companies an additional reason for the exercise of great care in the fact of the greatness of the danger, and the inability of the passenger to help himself.

Where the defendants made a bridge for more convenient access from one platform to another, and a passenger was injured in crossing by reason of the bridge being badly built, the defendants were held liable (*r*), upon the ground that the passenger was invited to use the bridge. So where the company have always allowed to passengers to cross by a particular path it is equivalent to an assurance that they may safely use it (*s*).

When notices have been put up forbidding persons to cross the line, but the company's servants have allowed the notices to be disregarded, such notices are no answer to an action for negligence (*t*); but, where there is no sufficient evidence of the company's acquiescence in the passenger's crossing the line, it is the passenger's own negligence if he crosses the line being aware of a bridge provided on purpose for crossing (*u*).

Carriers of passengers are not liable for any injury occasioned by anything extraneous to the work in which they are engaged, and as to which they had no reasonable ground for supposing that ordinary and proper care had not been taken by those persons whose duty it was to take such care (*x*). They are bound to see that everything under their own control is in full and complete and proper order (*y*).

So they are bound to construct their works so as to resist

(*r*) *Longmore v. G. W. Ry. Co.*, 19 C. B. N. S. 188; 35 L. J. C. P. 135, note. There was a safe bridge further off by which the plaintiff might have crossed.

(*s*) See *Rogers v. Rhymney Ry. Co.*, 26 L. T. N. S. 1879.

(*t*) *Dublin, W. & W. Ry. Co. v. Slattery*, L. R. 3 App. Cas. 1155. It seems that if the company acquiesce in persons crossing their line promiscuously at all points they are not

bound to protect such persons, especially if persons generally cross at a particular point, *Harrison v. N.E. Ry. Co.*, 29 L. T. N. S. 844. This case does not appear to have been cited on the argument in *Dublin, W. & W. Ry. Co. v. Slattery*.

(*u*) *Wilby v. Midland Ry. Co.* 35 L. T. N. S. 244 Q. B.

(*x*) *Daniel v. Met. Ry. Co.*, L. R. 5 Eng. & Ir. App. 45.

(*y*) *Id.*

all ordinary storms, &c., which may reasonably be expected, though they may be of rare occurrence (*z*).

Proprietors of coaches and carriages are responsible to those whom they invite to enter their vehicles (*a*).

And it has been held that the proprietor is liable for latent defects (*b*) provided the defect could have been discovered on examination, or could have been prevented in the course of manufacture (*c*).

So also railway companies are liable for the faulty construction of carriages into which they invite travellers, except as to latent undiscoverable defects (*d*).

Use of Train and Carriages.

There have been numerous decisions upon the question whether the fact of a train not pulling up at a platform, coupled with other circumstances, is negligence or not. Those other circumstances are different in each case, and are the turning points in each decision (*e*). In these cases, as in all others, the question of negligence is entirely one for the jury (*f*).

(*z*) *G. W. Ry. Co. of Canada v. Fawcett*, 1 Moo. P. C. N. S. 101.

(*a*) *Bremner v. Williams*, 1 C. & P. 414 (coach just repaired and examined two journeys before accident, held liable); *Curtis v. Drinkwater*, 2 B. & Ad. 169 (improper construction of coach, omission of iron railing between luggage and passenger); *Templeman v. Haydon*, 12 C. B. 507 (shafts of cart breaking); *Welch v. Laurance*, 2 Chit. 262 (chainstay of cart); *Israels v. Clarke*, 4 Esp. 259 (overloading a coach); so also are ferrymen, see *Willoughby v. Horridge*, 12 C. B. 742.

(*b*) *Sharp v. Gray*, 9 Bing. 457.

(*c*) *Redhead v. Mid. Ry.*, L. R. 2 Q. B. 412; 4 Q. B. 379; 38 L. J. Q. B. 169; *Richardson v. Gt. Eastern Ry.*, L. R. 1 C. P. D. 342.

(*d*) See *Redhead v. Mid. Ry. Co.*, *supra*; *Richardson v. G. East. Ry.*

Co., *supra*; see also *Stokes v. Eastern Co. Ry.*, 2 F. & F. 691; *Ford v. L. & S. W. Ry. Co.*, 2 F. & F. 730 (not bound to use every possible precaution which speculative science may suggest); but where a company had tested a wheel, but afterward did not test it for some time, the jury having found that they ought, a rule for a new trial was refused, *Manser v. East. Co. Ry. Co.*, 3 L. T. N. S. 585.

(*e*) See remarks by Kelly, C.B., in *Rose v. N. E. Ry. Co.*, *infra*; and by Coleridge, C.J., in *Robson v. N. E. Ry. Co.*, *infra*.

(*f*) *Bridges v. North London Ry. Co.*, *infra*; *Robson v. N. E. Ry. Co.*, *infra*, though, upon a mere scintilla of evidence, a judge would non-suit; *Met. Ry. Co. v. Jackson*. See *ante*, p. 10, note (*u*).

There is probably no negligence in the mere fact of a train not pulling up at a platform, provided due care is taken that no injury arises from it; but if, from want of such care, or if, by some action of the defendants connected with such stopping, the plaintiff is led into danger, the defendants are liable for negligence. If, in fact, the stopping is of a misleading character (*g*) the defendants will be liable. This may depend upon how long the train stops (*h*); whether it is dark or light (*i*); whether there is an express or implied invitation to alight (*k*); or other such like circumstances.

If there is no misleading—if, for instance, the plaintiff exercises his own discretion in the matter, and in broad daylight chooses to jump from the carriage rather than run the chance of being carried on, or the trouble of insisting upon the train backing, then the company are not liable (*l*).

It should seem that a railway company is not bound to have a platform as long as any of its trains, but is only bound to do what is reasonable in that respect (*m*).

Akin to the question of negligence, in overshooting the

(*g*) As to the effect of putting the plaintiff off his guard, see the judgments in *D. W. & W. Ry. Co. v. Slatery*, L. R. 3 App. Cas. 1155.

(*h*) *Cockle v. S. E. Ry. Co.*, L. R. 7 C. P. 321; 41 L. J. C. P. 140; *Bridges v. L. & N. W. Ry. Co.*, L. R. 7 H. L. 215; 43 L. J. Q. B. 131; *Weller v. L. B. & S. C. Ry. Co.*, L. R. 9 C. P. 126; 43 L. J. C. P. 137; *Robson v. N. E. Ry. Co.*, L. R. 2 Q. B. D. 86; 46 L. J. Q. B. 50; *Rose v. N. E. Ry. Co.*, L. R. 2 Ex. D. 248; 46 L. J. Ex. 374; *Nichols v. Gt. Southern Co.*, 7 Ir. C. L. 40, 21 W. R. 387.

(*i*) *Prosser v. Bristol & Ex. Ry. Co.*, 24 L. T. 105; *Cockle v. S. E. Ry. Co.*, *supra*; *Weller v. L. B. & S. C. Ry. Co.*, *supra*.

(*k*) *Foy v. L. B. & S. C. Ry. Co.*, 13 C. B. N. S. 225. (The mere calling out of the name is not of itself a sufficient invitation: see *per Lord Hatherley* in *Bridges v. L. & N. W. Ry. Co.*,

supra; and see *Lewis v. L. C. & D. Ry.*, *infra*); *Weller v. L. B. & S. C. Ry. Co.*, *supra*. (In this case all three elements calculated to mislead were present—it was dark, there was an express invitation, and the train stopped for a reasonable time, as if for alighting.) *L. & N. W. Ry. Co. v. Hellawell*, 26 L. T. N. S. 557 (porters called out, "all out for Huddersfield," and opened doors, held negligence); see also *Gill v. G. E. Ry. Co.*, 26 L. T. N. S. 945.

(*l*) *Siner v. G. W. Ry. Co.*, L. R. 4 Ex. 117; 38 L. J. Ex. 67 (see, however, the observation of Brett, L. J., in *Robson v. N. E. Ry. Co.*, on the above case); *Lewis v. London, Chatham & Dover Co.*, L. R. 9 Q. B. 66; 43 L. J. Q. B. 8 (names called out, train stopped temporarily and then backed, station well known, no misleading).

(*m*) See *per Lush, J.*, *Owen v. Gt. W. Ry. Co.*, 46 L. J. Q. B. 486.

platform, is that of opening and shutting of doors; and again the main question is, whether the plaintiff has been misled or not. If, from the position of affairs induced by the defendants, the plaintiff could reasonably suppose that he could safely descend from, or ascend to the carriage, or place his hand between the door-jamb, then the defendants have been guilty of negligence. Here again, also, the circumstances decide the question, as, for instance, was it dark at the time (*n*), had the passenger fairly entered the carriage before the door was shut (*o*) or not (*p*). Thus, also, it is misleading for the company not to keep the carriage doors properly fastened whilst the train is in motion (*q*), or, it seems, when standing still (*r*). In one case, where the door of a carriage flew open three times, and the plaintiff, in trying to shut it the fourth time, fell out and was injured, it was held that the company were not liable, for that, although they were negligent, the damage was not the necessary or natural result of such negligence, but that the plaintiff, to whom the inconvenience of the open door was slight (as the train would stop in three minutes), and the danger of trying to close it great, had by his own act contributed to the accident. Brett, J., seemed reluctantly to acquiesce in this decision, and remarked upon it in *Gee v. Metropolitan Railway Co.*, *supra*. This case seems fairly to illustrate the difficulty of deciding, as a matter of fact, whether there is negligence or not. One would have thought that the danger of leaving a door of a train open was very great, and the danger of trying to close it very small (*rr*).

Upon the other hand, where the defendants have done

(*n*) *Fordham v. L. B. & S. C. Ry. Co.*, L. R. 4 C. P. 619; 38 L. J. C. P. 324.

(*o*) *Richardson v. Met. Ry. Co.*, 37 L. J. C. P. 176; *Maddox v. L. C. & D. Ry. Co.*, 38 L. T. N. S. 458 C. P.; but see *Coleman v. S. E. Ry.*, 4 H. & C. 699 (boy of twelve years of age).

(*p*) *Fordham v. L. B. & S. C. Ry. Co.*, *supra*.

(*q*) *Gee v. Met. Ry. Co.*, L. R. 8 Q. B. 161; 42 L. J. Q. B. 105.

(*r*) *Richards v. Gt. E. Ry. Co.*, 28 L. T. 711.

(*rr*) *Adams v. L. & Y. Ry. Co.*, L. R. 4 C. P. 739; 38 L. J. C. P. 277.

nothing to mislead the plaintiff, but he chooses of his own motion to put himself in danger, of course the negligence is his own (*s*).

The mere fact of a window slipping down is not evidence of negligence, as it seems (*t*).

Not whistling before coming to a station where persons are in the habit of crossing on the level would, it seems, be evidence of negligence (*u*).

As to not fencing level crossings for the protection of cattle, see Owners of Real Property, Ch. II. s. 2, p. 39; and as to level crossings, as respects passengers crossing, see Owners of Real Property, Chap. III. s. 2, p. 80, 82, 97, 98.

SECTION IX.

Innkeepers.

An innkeeper is not an insurer of the goods of his guest, but is liable for negligence (*x*), and is bound to take something more than ordinary care of his guest and his guest's goods (*y*). It is in his character as innkeeper that he is required to exercise such diligence; but if he is a mere bailee (*z*), or a mere lodging-house keeper (*a*), he would only be liable for ordinary negligence.

The fact of the loss of the goods is *prima facie* evidence

(*s*) See *Met. Ry. Co. v. Jackson*, L. R. 3 App. Cas. 193; 47 L. J. C. P. 303; and see *post*, Ch. VI., Contributory Negligence.

(*t*) *Murray v. Met. District Ry. Co.*, 27 L. T. 762.

(*u*) *Dublin, W. & W. Ry. Co. v. Slaterry*, L. R. 3 App. Cas. 1164, *per* Lord Cairns.

(*x*) *Calve's Case*, 1 Sm. L. C., 5th ed. 102; *Dawson v. Chamney*, 5 Q. B. 164. As to innkeeper's liability to persons coming to the inn, but not to

deal with him, see *Oxford v. Prior*, 14 Weekly Rep. 611; and as to a temporary call for refreshment, see *Bennett v. Mellor*, 5 T. R. 273.

(*y*) *Campbell*, s. 55.

(*z*) *Hyde v. Mersey Nav. Co.*, 5 T. R. 389; *Williams v. Gesse*, 3 Bing. N. C. 849.

(*a*) *Bac. Ab. Inns*, C. 5; *Parkhurst v. Foster*, Salk. 388; see *Dansey v. Richardson*, 3 E. & B. 144; *Holder v. Soulby*, 8 C. B. N. S. 254.

undertaking of the performance of something was called "*mandatum*," and it would be immaterial that it was done gratuitously, for the Roman law said, if you undertake to do a thing you must take ordinary care about the doing of it (*r*). The English law, on the other hand, says that in consideration of me trusting you with the doing of the thing you impliedly promise me to do it, and so you create a duty to do it (*s*), and you must take ordinary care at the least. So that both the Roman and English laws say that ordinary care must be taken in the case of gratuitous mandate, or, in other words, that a physician acting gratuitously is liable for ordinary negligence, at the least. But it has been felt that a physician acting gratuitously is still a person who professes to use skill, and that if he does not exercise the skill which he ought to have he is guilty of a grave breach of his duty; and because it is a general rule that a person who is unpaid is not liable except for gross negligence, lawyers have called this want of skill, gross negligence; and so it has come to be said that a physician who acts gratuitously is only liable for gross negligence, whereas he is liable for showing want of skill. In truth the word "gross" does not here mean anything more than that it would be ordinary negligence in another person, but that in a person who should be skilful ordinary negligence may be called "gross."

A surgeon is not an actual insurer; he is only bound to display sufficient skill and knowledge in his profession (*t*). He does not undertake to perform a cure, or even to use the highest possible skill, but a proper and competent degree of skill (*u*).

(*r*) Wharton, s. 493; Camp. s. 8, ante, p. 9, note (*q*).

(*s*) *Coggs v. Bernard*, 1 Sm. L. C. 177.

(*t*) *Per Tindall, C.J., Hauke v. Hooper*, 7 C. & P. 84.

(*u*) *Lanphier v. Phipos*, 8 C. & P. 475; *Rich v. Pierpont*, 3 F. & F. 35. In a case at *Nisi Prius*, Perionowski

v. Freeman, 4 F. & F. 982, Cockburn, C.J., is reported to have said that medical gentlemen who give their services gratuitously were not to be made liable for negligence for which they were not personally responsible. (Nurses gave too hot a bath to a patient in a hospital.)

An unqualified person who acts as a doctor is of course equally bound to bring competent skill to the performance of the duty which he has undertaken (*x*).

The cases in which mere negligence has been established against professional persons, such as solicitors, doctors, &c., do not appear to be very numerous, and two reasons may be given for this. In the first place, the taking of care is almost their *raison d'être*, while to many other persons the duty to take care is an impediment to their business; and in the second place, and as a consequence from the above-mentioned reason, when they are negligent, such negligence amounts in general to fraud or intentional neglect. In the case of doctors such matters have become the subject of investigation in the criminal courts where death has ensued (*y*).

A medical man having once undertaken a case cannot desert it without reasonable cause, just as a solicitor cannot without good cause abandon the suit of his client (*z*).

Where the ground for the allegation of negligence is a general want of that skill which a medical man undertakes to possess the defendant may give evidence of general skill; but where there is no doubt of his general skill but the ground for the allegation of negligence is that in the particular case he showed a want of skill, evidence of general skill will not (it is said) be received (*a*).

SECTION XI.

Solicitors.

Solicitors, like physicians, evidently undertake to bring to the duties which they have to perform something more than

(*x*) *Ruddock v. Lowe*, 4 F. & F. 519; *Jones v. Fay*, *ib.* 525.

(*y*) See *R. v. St. John Long*, 4 C. & P. 398, and the rest of the cases collected in *Russell on Crimes*, 5th ed.

vol. i. p. 664, *et seq.*

(*z*) "*Shearman on Negligence*," s. 441; see *Hoby v. Buitt*, 3 B. & Ald. 349 (solicitor abandoning case).

(*a*) "*Shearman on Negligence*," s.

ordinary care, for they are persons of skill and knowledge and, like physicians, undertake matters of the very highest difficulty and importance. It is clear that ordinary neglect where so great care is demanded becomes very grave and in the language of some of the judges is "gross negligence" (*b*). Upon the other hand, as the duty is most difficult it is not every error or want of success that is to be attributed to negligence, and where it has been attempted to make a solicitor liable for some error which any careful man might have fallen into, the judges have said that solicitors are only liable for "gross negligence" (*c*).

As has been said before (*d*), a high duty has been undertaken which upon the other hand is a difficult one, and the question is, has it been reasonably fulfilled?

A solicitor is liable for the negligence of his agent (*e*), partner (*f*), or clerk (*g*).

The obligation of the solicitor is towards his client and not towards a stranger, to whom he is not responsible for erroneous advice (*h*).

He is liable although his services are rendered gratuitously (*i*), though (it is said) only for gross negligence (*k*).

442. In *Seare v. Prentice*, 8 East, 348, no evidence was given of general want of skill, but the evidence relied on was that of negligence in the particular case which the jury negatived and the Court would not disturb the verdict although the judge had misdirected the jury that they could not inquire into the want of skill.

(*b*) See note (*x*) *ante*, pp. 11, 73, as to the phrase "gross negligence."

(*c*) *Laidler v. Elliot*, 3 B. & C. 738, and the cases there cited; *Elkington v. Holland*, 9 M. & W. 659.

(*d*) *Ante*, Physicians.

(*e*) *Simons v. Rose*, 31 Bea. 11.

(*f*) *Norton v. Cooper*, 3 Sm. & Giff. 375; see *Dundonald v. Masterman*, L. R. 7 Eq. 504; 38 L. J. Ch. 350; *Bickford v. D'Arcy*, L. R. 1 Ex. 554; 35 L. J. Ex. 202.

(*g*) *Floyd v. Nangle*, 3 Atk. 568; *Prestwick v. Poley*, 18 C. B. N. S. 806; 34 L. J. C. P. 189.

(*h*) *Fish v. Kelly*, 17 C. B. N. S. 194; if he undertakes to act for any person without authority he is liable to that person for any injury which arises from his conduct; *Westaway v. Frost*, 17 L. J. Q. B. 286, and even to the defendant against whom he proceeds; see *Hubbard v. Phillips*, 13 M. & W. 702; *Andrews v. Hawley*, 26 L. J. Ex. 323.

(*i*) *Donaldson v. Holdane*, 7 Cl. & F. 762.

(*k*) "Shearman on Negligence," s. 215; but it is not so said in the case above cited. Possibly a jury might be induced to look with less severity upon the conduct of a solicitor who acted gratuitously. In the case above cited Lord Brougham said, "His con-

When a solicitor has accepted his client's retainer he is bound to prosecute the matter intrusted to him to its termination. He is not bound, indeed, to proceed if he cannot upon request obtain his fees or security for them, and if he gives his client reasonable notice of his intention to throw up the retainer (*l*).

Generally speaking, the retainer of the solicitor is at an end when judgment is recovered (*m*); but it may be renewed, and the attorney will then retain his power to bind his client by a compromise (*n*).

A solicitor acting *bond fide* and reasonably, and not contrary to his client's direct commands (*o*), may compromise a suit (*p*).

The client is not bound to show that he would have won his cause but for the negligence of the solicitor. It is sufficient if he shows negligence operating to produce the loss of the cause (*q*).

Where an action is brought by a solicitor for his costs, he must of course prove his case, *i.e.*, he must show affirmatively that he has fairly, carefully, and honestly discharged his duty (*r*).

The question of what in each particular case amounts to

duct in volunteering his services does incline one to think that the liability he incurred in point of law is somewhat hard upon him; but still I cannot doubt he is liable," and accordingly costs were not found against him.

(*l*) *Wadsworth v. Marshall*, 2 Cr. & J. 665; *Hoby v. Built*, 3 B. & Ad. 350; *Van Sandau v. Browne*, 9 Bing. 402.

(*m*) *Flower v. Bolingbroke*, 1 Str. 639; *Brackenbury v. Pell*, 12 East. 588; *Macheath v. Ellis*, 4 Bing. 578. It is said that a solicitor is not bound to move for a new trial upon a point of law, nor to institute new collateral suits without special instructions. *Shearman*, s. 227, citing *Hastings v. Halleck*, 13 Cal. 203; *Pennington v.*

Yell, 6 Eng. (Ark.) 212.

(*n*) *Butler v. Knight*, L. R. 2 Ex. 109; 36 L. J. Ex. 66.

(*o*) *Fray v. Voules*, 1 El. & El. 839.

(*p*) *Prestwick v. Poley*, 34 L. J. C. P. 189. As to counsel's power to compromise a suit, see *Straus v. Francis*, L. R. 1 Q. B. 379; 35 L. J. Q. B. 133.

(*q*) *Godefroy v. Jay*, 7 Bing. 413. The solicitor may show in answer that there has been no damage; but even then the plaintiff is, as it seems, entitled to a verdict for nominal damages. See the case above cited, and *Marzetti v. Williams*, 1 B. & Ad. 415, and the cases as to sheriffs, *post*, p. 137.

(*r*) *Allison v. Rayner*, 7 B. & C. 441.

negligence is not instructive, and the cases are collected together in a note (s) for the purposes of reference.

A solicitor is not liable for error in judgment upon points of new occurrence, or of nice or doubtful construction (t).

Where the retainer is to do a particular thing, the solicitor is liable for negligence only with respect to that particular matter; and though his negligence in respect of matters connected therewith may cause injury to the client, he is, it seems, not liable (u).

In a case of unusual difficulty, or where some new point arises, the skill and knowledge which a solicitor is bound to bring to the execution of his duties may be insufficient; and, however competent he individually may be, he may desire to

(s) *Brumbridge v. Massey*, 28 L. J. Ex. 59; *Hayne v. Rhodes*, 8 Q. B. 342; *Hopgood v. Parkin*, L. R. 11 Eq. 74; *Cooper v. Stephenson*, 31 L. J. Q. B. 292; *Hunter v. Caldwell*, 16 L. J. Q. B. 274; *Watts v. Porter*, 3 E. & B. 743 (cases of mortgage); *Taylor v. Gorman*, 4 Ir. Eq. Rep. 550 (particulars of sale); *Potts v. Dutton*, 3 Beav. 493 (expenses of conveyance); *Stannard v. Ullithorne*, 10 Bing. 491 (unusual covenants); *Knights v. Quarles*, 2 B. & B. 102; *Allen v. Clark*, 1 N. R. 358; *Treson v. Pearman*, 3 B. & C. 799; *Wilson v. Tucker*, 3 Stark. 154 (cases of investigation of title); *Parker v. Rolls*, 14 C. B. 691; *Elkington v. Holland*, 9 M. & W. 659 (cases of deeds not under seal, or unattested); *In re Bolton*, 9 Beav. 272; *Re Spencer*, 18 W. R. Ch. 240 (mistake in order of Court); *Reeve v. Palmer*, 5 C. B. N. S. 84 (loss of deed); *Donaldson v. Haldane*, 7 Cl. & F. 762; *Dartnall v. Howard*, 4 B. & C. 345 (deposit of money); *Cox v. Leech*, 1 C. B. N. S. 617; *Hunter v. Caldwell*, 10 Q. B. 69; *Frankland v. Cole*, 2 Cr. & J. 590; *Huntley v. Bulwer*, 6 Bing. N. C. 111; *Stannard v. Ullithorne*, 10 Bing. 491; *Jacaud v. French*, 12 East. 317; *Plant v. Pearman*, 41 L. J. Q. B. 169; *Long v. Orsi*, 18 C. B. 610; *Stokes v. Trumper*, 2 K. & J. 232;

Williams v. Gibbs, 5 Ad. & El. 208; *Kemp v. Burt*, 4 B. & Ad. 424; *Hart v. Frame*, 6 Cl. & F. 193; *Godefroy v. Jay*, 7 Bing. 413; *Simons v. Rose*, 31 Beav. 1; *Russell v. Stewart*, 3 Burr. 1787; *Pitt v. Yalden*, 4 Id. 2060; *Laidler v. Elliot*, 3 B. & C. 738; *Russell v. Palmer*, 2 Wils. 325; *Hill v. Finney*, 4 F. & F. 616 (cases of neglect or ignorance of procedure); *Reece v. Rigby*, 4 B. & Ald. 202; *Rex v. Tew*, Sayer, 50; *Nash v. Swinburne*, 3 Man. & Gr. 630; *De Rouffigny v. Peale*, 3 Taunt. 484; *Dax v. Ward*, 1 Stark. 409; *Hawkins v. Harwood*, 4 Ex. 503; *Swannell v. Ellis*, 1 Bing. 347 (cases of neglect in preparing for trial or attending); *Allison v. Rayner*, 7 B. & C. 441 (not informing client as to costs). A curious case is reported (*Lee v. Dixon*, 3 F. & F. 744) where a solicitor brought an action on behalf of his client in a superior Court for a very small sum of money, and the plaintiff had to pay the costs. The action was twice tried, the first time with a verdict for the plaintiff, the second with a verdict for the defendant.

(t) *Godefroy v. Dalton*, 6 Bing. 468; *Laidler v. Elliot*, 3 B. & C. 738.

(u) *Langdon v. Godfrey*, 4 F. & F. 445.

act under the advice of counsel. If, therefore, upon such a matter he fairly and fully lays a case before counsel, and follows the advice carefully, he is discharged from liability if it should turn out that such advice was fallacious (*x*); but upon matters which are entirely within his own province, and should be known to him, he cannot shelter himself under the opinion of counsel (*y*).

A patent agent is expected to know the law relating to the practice of obtaining letters patent, and is answerable for negligence causing injury to his client by want of knowledge and skill (*z*).

SECTION XII.

Bankers, &c.

Bankers, in the course of their business as such, are bound to exercise something more than ordinary care. Like physicians and lawyers, they hold themselves out to be persons of care and skill, and they undertake most important duties. They are only bailees for reward of certificates intrusted to them for safe custody, upon which they receive commission for collecting the dividends, or upon which they have a lien (*a*), and as such, are liable for ordinary negligence at the least; and where goods are simply deposited with them, and they make no charge, and the customer keeps the key of the box, they are merely gratuitous bailees; and, probably, something

(*x*) *Andrews v. Handley*, 26 L. J. Ex. 323; *Fray v. Voules*, 1 El. & El. 839; *Kemp v. Burt*, 1 Nev. & Man. 262; *Manning v. Wilkin*, 12 L. T. 249.

(*y*) *Godefroy v. Dalton*, 6 Bing. 460, 469.

(*z*) *Lee v. Walker*, L. R. 7 C. P. 121; 41 L. J. C. P. 91 (delay of four months in getting patent sealed).

(*a*) *In re United Service Co., Johnson's Claim*, L. R. 6 Ch. 212; 40 L. J. Ch. 286.

less than ordinary care is all that is required of them (*b*). But with respect to money placed in their hands by their customers for the ordinary purposes of banking, whether they receive a profit or not, they hold themselves out as persons worthy of trust, and as persons of skill, and they must be expected to use something more than ordinary care (*c*).

A banker would be liable for negligently refusing to cash his customer's cheque when he had sufficient funds in hand (*d*).

So bankers are liable for negligently paying forged cheques (*e*), and there can be little doubt that they are bound to exhibit skill in detecting such forgeries. They are not liable if there has been contributory negligence (*f*), but it seems that such contributory negligence, in order to be an answer in an action for negligence against bankers, must be negligence in regard to the particular matter in dispute, and be in the nature of an estoppel (*g*).

A manager of a bank discounting bills for companies in which he has an interest without disclosing that fact is not guilty of negligence if he is acting in the ordinary course of business, and has not exceeded his powers (*h*).

Assuming it to be the duty of a banker not to disclose the state of his customer's account without reasonable cause (*i*), the question of reasonableness is for the jury (*j*).

(*b*) *Giblin v. McMullen*, L. R. 2 P. C. 317; *Foster v. Essex Bank*, 17 Mass. 479; *Scott v. National Bank of Chester Valley*, 72 Pa. St. 472; *Lancaster Bank v. Smith*, 62 Penn. St. 47.

(*c*) *Wharton*, s. 510.

(*d*) *Marzetti v. Williams*, 1 B. & Ad. 415. This case was not founded on negligence; the action was substantially founded on the contract, and a wilful breach was alleged, but Taunton, J., puts it on the breach of duty.

(*e*) *Bank of Ireland v. Trustees of Evans' Charity*, 5 H. L. C. 389.

(*f*) *Young v. Grote*, 4 Bing. 253.

The authority of this case has been very much questioned, see *Baxendale v. Bennett*, L. R. 3 Q. B. D. 525.

(*g*) *Anold v. Cheque Bank*, L. R. 1 C. P. D. 578; 45 L. J. C. P. 562.

(*h*) *Bank of Upper Canada v. Bradshaw and Others*, L. R. 1 P. C. 479.

(*i*) Which it is submitted is without doubt.

(*j*) *Hardy v. Veasey*, L. R. 3 Exch. 107; 37 L. J. Ex. 76; *Foster v. Bank of London*, 3 F. & F. 214, considered. An action would arise at all events upon special damage shown, *Hardy v. Veasey*, *supra*.

SECTION XIII.

Public Officers (k).

Where the duties of a public officer are ministerial he is liable to an action of negligence if he negligently fails in the performance of them; but where they are discretionary or judicial he is not so liable (*l*). In the latter case he is, indeed, in general liable in another form of action where he has been corrupt or malicious, or has acted beyond the scope of his authority (*m*). Sometimes an officer whose principal duties are judicial may have to act ministerially in some particular duty or in some particular part of his judicial duties, and in respect of his ministerial duties he is liable to the charge of negligence (*n*).

Public officers, whether their duties are of a general public nature, or of a *quasi* public nature (that is, who act upon request of individuals for reward), are liable for negligence, and are not protected merely because they act *bond fide* and to the best of their skill and judgment, but they are bound to conduct themselves in a skilful manner (*o*).

Public officers are bound to exercise care in selecting subordinates, and in superintending them; but there is a

(*k*) The most usual way of compelling public officers to perform their duties is by *mandamus*, but this form of remedy is outside the scope of the present work.

(*l*) See *Linford v. Fitzroy*, 13 Q. B. 240 (admitting to bail, judicial, not ministerial); *Ashby v. White*, 1 Smith L. C. 216, 5th ed., see p. 258, and *Cullen v. Morris*, 2 Stark. 587 (returning officer at election, partly ministerial, partly judicial); *Barry v. Arnand*, 10 A. & E. 546 (collector of customs, ministerial); *Miller v. Seare*, 2 W. Bl. 1141 (commissioner in bankruptcy imprisoning, ministerial); *Shinotti v. Bumpstead*, 6 T. R. 646 (manager of lottery, ministerial); *Tozer v. Child*, 7 E. & B. 377 (returning officer,

judicial); *Pickering v. James*, L. R. 8 C. P. 489; 42 L. J. C. P. 217 (presiding officer at ballot, ministerial).

(*m*) As this is beyond the scope of this work, the reader is referred to other treatises as to the liability of judges, magistrates, and other officers, in respect of malicious and corrupt acts. Judges and barristers are exempted from actions for negligence on the ground of public policy. The question, what is a ministerial act, and what a judicial or discretionary act, will depend upon the circumstances.

(*n*) *Shearman*, 165; *Ferguson v. Kinnoul* (Earl of), 9 Cl. & F. 251; *Brasyer v. Maclean*, L. R. 6 P. C. 398; 44 L. J. P. C. 79.

(*o*) See *Jones v. Bird*, 5 B. & Ald. 837.

distinction between public officers whose duties are of a general public nature, as officers or servants of the Government or public, and public officers whose duties are of a *quasi* public nature, as persons called upon by individual members of the public to do particular acts. The former are not responsible for the negligence of those who are their deputies or subordinates, for these are, like themselves, servants of the Government or the public, who is the principal or master (*p*); but the latter class of officers have always been held liable for the negligence of their servants. Who are public servants of the former class so as to exempt them from liability for the acts of their subordinates has not been always clearly determined. It was long thought that all commissioners appointed by the Crown and intrusted with the care of public works were such, and as they were formerly *personally* liable if at all, it was held that they were not so liable; but now that such bodies are only liable in their corporate capacity, they are held liable for the acts of those whom they employ (*q*).

If a public officer intrusts his public duty, which he ought to do himself, to another person, who neglects to perform the duty, the public officer is liable to an action for negligence (*r*). If he is permitted by statute to delegate his

(*p*) *Nicholson v. Mounsey*, 15 East. 384 (captain of ship); *Lane v. Cotton*, 1 Lord Raym. 646 (post office); see also *Whitefield v. Despenser*, 2 Cowp. 765. *Per* Blackburn, J., in *Mersey Dock v. Gibbs*, L. R. 1 H. L. 111; see also *Reg. v. Treasury*, L. R. 7 Q. B. 387. Since the Government have undertaken to transmit inland telegraph messages, the above principle applies to any injury arising from the negligence of telegraph clerks. It may here be mentioned that formerly the receiver of a message could not sue the company, because he had no privity with them, and he could not sue the sender for a mistake made by

the company's clerk. So that the receiver of a message was and is without remedy (see *Playford v. U. K. Tel. Co.*, L. R. 4 Q. B. 70; 38 L. J. Q. B. 249; *Dickson v. Reuter's Tel. Co.*, L. R. 2 C. P. D. 62; 46 L. J. C. P. 192). The sender would formerly have had his remedy against the company, but now he has not. In America it is said that telegraph companies are common carriers (see *Shearman*, ss. 554, 555), though not liable except for negligence or misconduct, s. 556.

(*q*) *Mersey Docks v. Gibbs*, *supra*.

(*r*) *Pickard v. Smith*, 19 C. B. N. S. 480 (contractor). See *ante*, pp. 69, 96, as to this.

duties to another, and does so, that other becomes responsible; but if he continues to act, he himself is responsible (*s*).

It must be clearly shown upon whom the duty rests which has been neglected, and the neglect of which caused the damage. Sometimes there is a duty to superintend others in the execution of a duty, or to step in to perform such duty when neglected by others, or to pay for the performance of it by others, but the duty to do the thing rests upon those others, and they are the persons primarily responsible. The damage flows immediately from their neglect of their duty, and they are the persons liable for such neglect.

Where Navigation Commissioners were by their Act to give notice to their lessee of non-repair of a canal, and in case of non-compliance to do the repairs themselves, and they knew of a want of repair and gave no notice, it was held they were not responsible, for the injury did not flow immediately from their neglect to give notice. The primary duty was on the lessee, who was merely under the superintendence of the commissioners (*t*). Where Improvement Commissioners had by their Act power to request a waterworks company to fix plugs and pipes, and were to pay for the repairs of them by the company, it was held that the company were liable, as the duty of doing the repairs was cast upon them, although the commissioners were to pay for them being done (*u*).

The question, what is or is not negligence in an officer of a Court of justice, a notary, a sheriff, &c., depends upon particular circumstances, and although there are many cases in the books, yet there is no particular test or principle to be gathered from them. It is of course negligence to neglect a duty, but the question whether there is a duty depends upon the particular circumstances, as for instance the interpretation of the statute under which the officer is acting,

(*s*) *Pickering v. James*, L. R. 8 C. P. 489; 42 L. J. C. P. 217 (presiding officer at ballot).

(*t*) *Walker v. Goe*, 4 H. & N. 350.
(*u*) *Bayley v. Wolverhampton Waterworks Co.*, 6 H. & N. 241.

or the usual practice of the Courts, or the necessities of the case. If there is no duty arising in any way to do a thing there can be no negligence in omitting to do that thing (*x*).

A notary public appears to be a person to whom the laws of America (*y*), France (*z*), and Scotland (*a*) give large powers, but in England (*b*) his functions are more limited; but whether he is employed as a public officer to do ministerial acts, or as a private person undertaking to exercise skill for reward, it is submitted that he is bound to exercise more than ordinary care.

A high degree of responsibility attaches to a sheriff towards the person who employs him (*c*).

His liability to the owners of goods seized is only that of an ordinary bailee, and he is only liable for ordinary negligence (*d*).

A sheriff's duties are ministerial, and the statutes imposing them usually inflict penalties for neglect in their performance, but as we have seen (*e*) the imposition of such penalties does not in general relieve them from their common law liability to an action for negligence.

Numerous cases are to be found as to what is or is not a negligent act on the part of a sheriff, but each case depends upon its own particular circumstances (*f*).

Where a sheriff has to take sureties on a replevin bond he

(*x*) See *Robinson v. Gell*, 12 C. B. 191. As to the question of whether, where a statute imposes a penalty on an officer for neglect, the remedy by action still survives, see *Atkinson v. Newcastle Waterworks Co.*; *Couch v. Steel*, *ante*, p. 103.

(*y*) See *Shearman on Negligence*, ss. 423—430.

(*z*) See *Nye v. Macdonald*, L. R. 3 P. C. 331.

(*a*) *Campbell on Negligence*, 2nd ed., p. 44.

(*b*) *Nye v. Macdonald*, *supra*; and see *Rex v. Scriveners' Co.*, 10 B. & C. 519. His public duties are chiefly the protesting of bills and giving

effect to mercantile documents in foreign Courts by certificate.

(*c*) It is said in *Hodgson v. Lynch*, Irish Rep. 5 C. L. 353, that he is only responsible for ordinary negligence. See also *Shearman*, s. 530, n. 4, *sed quære*.

(*d*) See *ante*, Ch. II., s. 7.

(*e*) *Ante*, p. 103.

(*f*) *Dennis v. Whetham*, L. R. 9 Q. B. 345; 43 L. J. Q. B. 129 (two writs fraudulent, return of *nulla bona* to third writ); *Allen v. Carter*, L. R. 5 C. P. 414; *Williams v. Rose*, L. R. 3 Ex. 5; 37 L. J. Ex. 12; *Dynam v. Baily*, L. R. 3 Q. B. 178; 37 L. J. Q. B. 71; *Godwin v.*

must exercise at least a reasonable care in accepting them (*g*). The penalty of the bond is the measure of damages (*h*).

In an action against a sheriff for negligence in executing mesne process, evidence such as would be sufficient to charge the original defendant with the debt is sufficient against the sheriff to support an averment that the original defendant was so indebted (*i*).

A sheriff is responsible for the negligent acts of his deputy, bailiff, or servant, done in execution of the sheriff's authority, but is not responsible for acts not done in execution of the warrant, unless the sheriff ratify the act of his agent (*j*).

He is not liable for the neglect of his predecessor (*k*).

Where it is admitted (*l*) that the person employing the sheriff has sustained no damage, nominal damages cannot be recovered; but whether nominal damages can be recovered in default of proof of substantial seems doubtful (*m*).

Justices of the peace are protected in the exercise of their discretion by the 11 & 12 Vict. c. 44, s. 4 (*n*).

SECTION XIV.

Negligence by Owners, &c., of Ships.

With respect to the carriage of goods by ships, the

Stone, L. R. 4 Ex. 331; 38 L. J. Ex. 153 (escapes). The plaintiff must show actual damage, *Williams v. Mostyn*, 4 M. & W. 145. Arrest on final process is in general abolished, 32 & 33 Vict. c. 62, s. 4.

(*g*) *Kindal v. Blades*, 5 Taunt. 225; *Scott v. Waithman*, 3 Stark. 168; *Jeffery v. Bastard*, 4 Ad. & El. 823; *Sanders v. Darling*, Bull. N. P. 60; *Gwillim v. Scholey*, 6 Esp. 100.

(*h*) *Jeffery v. Bastard*, *supra*.

(*i*) *Sloman v. Herne*, 2 Esp. 695; *Williams v. Bridges*, 2 Stark. 42; *Gibbon v. Coggin*, 2 Camp. 188.

(*j*) *Woodgate v. Knatchbull*, 2 T. R. 149; *Crowder v. Long*, 8 B. & C. 605; *Drake v. Sykes*, 7 T. R. 113; *Martin v. Bell*, 1 Stark. 416; *Jones v. Wood*, 3 Campbell 228. He is not liable for acts of a special bailiff ap-

pointed at request of the party: *De Moranda v. Dunkin*, 4 T. R. 119; *Cook v. Palmer*, 6 B. & C. 742; *Wood v. Finnis*, 7 Exch. 372.

(*k*) *Davidson v. Seymour, M. & M.* 34.

(*l*) *Williams v. Mostyn*, 4 M. & W. 145. So also a plea is good which denies that there was any damage, *Wylie v. Birch*, 4 Q. B. 566.

(*m*) See note to *Wylie v. Birch*, *supra*, at page 580; *Barker v. Green*, 2 Bing. 317; *Bales v. Wingfield*, 2 Nev. & M. 831; *Clifton v. Hooper*, 6 Q. B. 468; *Stimson v. Farnham*, L. R. 7 Q. B. 175; 41 L. J. Q. B. 52; *Levy v. Hale*, 29 L. J. C. P. 127.

(*n*) See *Pedley v. Davis*, 10 C. B. N. S. 492; 30 L. J. C. P. 374; *Newbold v. Coltman*, 6 Exch. 189.

owners are, *prima facie*, common carriers (*o*), and as such are in the nature of insurers; and the question of negligence does not arise; and, again, where their liability as common carriers is controlled by special contract, the whole question of the liability of the owner turns on the construction of the contract, and we have no space to discuss the particular cases.

With respect to the carriage of passengers the general principles already laid down with respect to carriers by land apply also to carriers by water, and the subject will here be only very shortly treated, and the reader must be referred to treatises upon the law of shipping (*p*).

As to unseaworthy ships, see the 36 & 37 Vict. c. 85.

A warranty of seaworthiness is implied in a contract for the carriage of a passenger, who may recover notwithstanding the penalty inflicted by the statute (*q*).

The extent of liability for damages for loss of goods, and for personal injury or loss of life, is regulated by the Merchant Shipping Act Amendment Act, 1862 (*r*). The reader is referred to s. 8, Carriers, *ante*, p. 110, and to the works above cited on shipping; see also Mayne on Damages, 262—265, 3rd ed.

It is not proposed in the present treatise to enter at great length into the peculiar rules and regulations relating to the navigation of ships. The reader must be referred to special works upon the subject (*s*), and all that can be done here is to give some account of the general law of negligence as it bears upon the duties of ship-owners, ship-captains, and others having the management of vessels, and of the principal statutes modifying the general law.

(*o*) *Nugent v. Smith*, 45 L. J. C. P. 697; L. R. 1 C. P. D. 423, C. A.

(*p*) *Maclachlan on Shipping*, 2nd ed., p. 310, *et seq*; *Maude & Pollock*, 3rd ed., 446, *et seq*.

(*q*) *Couch v. Steel*, *ante*, p. 103.

(*r*) 25 & 26 Vict. c. 63, see s. 54; and see 17 & 18 Vict. c. 104, ss. 506—512. These sections do not apply

to small craft. What are small craft, see M. S. Act, 1854, s. 2. They include foreign ships. See *Hunter v. McGown*, 1 Bligh. 580; *Morewood v. Pollok*, 1 E. & B. 743.

(*s*) *Maclachlan on Shipping*, 2nd ed., 1875; *Maude & Pollock on Shipping*, 2nd ed., 1861.

By the Judicature Act, 1873, s. 25, para. 9, "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail."

The rules hitherto in force in the Court of Admiralty which are here referred to are that generally, when both parties are to blame, they must share the loss equally, so that the plaintiff in such case recovers half his damages, where at common law if his negligence was "contributory negligence" he could not recover at all, as we shall see (*t*).

The Admiralty rules by the above provision are only to prevail in proceedings *for damages arising out of collisions*, and not in any other cases.

As to small craft, see Merchant Shipping Act, 1854, s. 2.

As in an action at common law, so also in an action in the Admiralty Courts, the plaintiff is bound in the first instance to make out a *prima facie* case of negligence. "The burden of proof lies upon the plaintiff so far; but it does not at all follow that it lies upon him throughout the whole case; for frequently by proving certain circumstances the burden of proof is thrown back upon the defendant, and he is bound to make out his case" (*u*). The defendant may then show that he was not to blame, for the accident was inevitable (*x*), or that the plaintiff contributed to the collision (*y*), in which latter case the damages will be divided (*z*).

By the Merchant Shipping Act, 1873, s. 17 (*a*), in cases of collision, where any of the provisions for preventing collision contained in or made under the Acts of 1854 to 1873, have been infringed, the ship which has infringed

(*t*) *Post*, Ch. V., Contributory Negligence.

(*u*) *Per* Dr. Lushington, *The Carron*, 1 Ec. & Ad. 93. See also *The Dumfries*, 1 Swab. 64; S. C. on app. 125.

(*x*) See *The Shannon* and other cases, *post*.

(*y*) *The Victoria*, 3 W. Rob. 52.

(*z*) See *post*.

(*a*) 36 & 37 Vict. c. 85.

them is to be decreed in fault, unless it is shown that the circumstances of the case warranted a departure from such provisions. The burden of proof is thrown upon the offending vessel (*b*), but if the neglect of the provisions was of such a character that it could not or in fact *did not* in any way contribute to the collision, which was solely caused by the negligence of the other vessel, the former vessel may recover (*c*).

The owners of the cargo or the ship might under the old rules recover the whole damages against a ship wholly to blame (*d*).

But where there has been misconduct on the part of both vessels, by the law of the Admiralty the owners can only recover a moiety of the damage which they have respectively sustained (*e*).

The innocent owner of a cargo may, *à fortiori*, recover a moiety of the damage (though not the whole) against the owner of a ship which has negligently come into collision with the ship containing his goods, notwithstanding his ship was equally negligent; for he is not identified with its negligence, nor in any way responsible for the collision (*f*); and he is also entitled to his costs (*g*).

By the 36 & 37 Vict. c. 85, s. 16, provision is made that in cases of collision the persons in charge of the vessels shall stay by each other to render assistance, &c.; and, if one of them does not do so, the presumption is that the collision was his fault (*h*).

(*b*) *The Fanny M. Corvill*, L. R. 4 A. & E. 417; 44 L. J. Ad. 44. See *Lawson v. Carr*, 10 Moo. P. C. 162, as to the effect of this upon the old rules; and see *The Milan*, *infra*.

(*c*) *The Englishman*, 47 L. J. Ad. 9; L. R. 3 P. D. 18; *The Magnet*, L. R. 4 A. & E. 417; 44 L. J. Ad. 34; *Morrison v. Genl. Steam Nav. Co.*, 8 Exch. 738.

(*d*) See *per Dr. Lushington* in *The Milan*, *infra*; *Brown v. Mallets*, 5 C. B. 599.

(*e*) *The Milan*, *infra*.

(*f*) *The Milan*, Lush. 388; 31 L. J. Adm. 105. This is contrary, as it seems, to the rule at common law, see *Thorogood v. Bryan*, *post*, Ch. V., Contributory Negligence.

(*g*) *The City of Manchester*, L. R. 5 P. D. 3.

(*h*) See *Ex parte Fergusson*, L. R. 6 Q. B. 38; 40 L. J. Q. B. 105; *The Queen*, L. R. 2 A. & E. 354; 38 L. J. Adm. 39; see also *The Adriatic*, 3 Asp. Mar. Law Cas. 16; 33 L. T. Rep. 102.

Sailing and steering, lighting and signalling rules are provided under the 25 & 26 Vict. c. 63, s. 25, by Order in Council, dated 9th January, 1863, and amended by the Order in Council of 30th July, 1868, and these rules will remain in force until the 1st September, 1880, when by Order in Council, dated 11th August, 1879, new rules will come in force which have been accepted by all the principal maritime nations.

A ship navigating a river seems undoubtedly to be much in the same position as a carriage going upon a road. It is upon a highway, and others exercising equal rights are proceeding upon the same highway; and the captain or manager of such ship is bound to exercise care and skill to prevent collision with other vessels (*i*).

As vessels, particularly steam-vessels, require considerable skill in their management, and the effects of want of care are likely to be so very disastrous, I think there can be no doubt that something more than ordinary care is required from those who undertake their management (*k*).

It seems that where one vessel is stationary and another moving, the presumption of negligence is against the one in motion (*l*); but this is, after all, only a presumption of common sense, and is liable to be rebutted (*m*).

It would seem that apart from any Orders in Council certain rules prevail, as of course, in the navigation of vessels. The recognised rule for sailing-vessels is that those having the wind fair shall give way to those on a wind, that when both are going by the wind the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other upon the larboard hand; that when both vessels have the wind large or abeam and meet,

(*i*) *Brown v. Mallett*, 5 C. B. 599.

(*k*) *The Syracuse*, 12 Wall. 167;
Bill v. Smith, 39 Conn. 206.

(*l*) *The Victoria*, 3 W. Rob. 52;
Cuthbertson v. Shaw, 18 How. 584;

The Granite State, 3 Wall. 310; *Bill v. Smith*, 39 Conn. 206.

(*m*) *The Victoria*, *supra*; *The City of Baltimore*, 5 Benedict, 474.

they shall pass each other in the same way on the larboard hand, to effect which two last-mentioned objects the helm must be put to port (*n*).

The law imposes upon the vessel having the wind free the obligation of taking proper measures to get out of the way of a vessel which is close-hauled, and of showing that it has done so, if not, the owners of it are responsible for the loss which ensues (*o*).

A steamer should give room to a sailing vessel as a rule (*p*).

Negligently managing a ship so as to injure a telegraph cable at the bottom of the seas affords a cause of action (*q*).

The not keeping a proper look out is one of the very strongest evidences of negligence (*r*), so also is the neglect of lights and signals (*s*).

Unnecessary delay in mooring a vessel, so that night coming on a collision occurs which would not have happened in the daylight, is negligence (*t*).

Inevitable accident is a good defence to an action for negligence in the management of a ship (*u*), as it is in other cases. If the ultimate *accident*, however, was partly caused by the defendant's negligence, the *accident* affords no answer (*x*).

Where the person in charge of the vessel has done all that

(*n*) Notice of Trinity House, dated 30th Oct., 1840.

(*o*) *Per* Sir William Scott, *The Wardrop*, Sims. 2 Dods. 87; see also *per* Sir John Nicholl, *The Chester*, 3 Hagg. 318.

(*p*) *St. John v. Paine*, 10 How. U. S. 588; *Handyside v. Wilson*, 3 C. & P. 528; *The Shannon*, 2 Hagg. Ad. 175; and see Article 15 of the Order in Council; see *Maclachlan on Shipping*, 2nd ed., p. 279.

(*q*) *Submarine Telegraph Co. v. Dickson*, 15 C. B. N. S.; 33 L. J. C. P. 139.

(*r*) *Thorpe v. Hammond*, 12 Wall. 408; *Bill v. Smith*, 39 Conn. 206; *The Ericson*, 1 Swab. 38; *The Chester*,

3 Hagg. 316; and see Article 20 of Orders in Council; *Maclachlan on Shipping*, 2nd ed., p. 280.

(*s*) *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; *The Sylph*, 2 Ec. & Ad. 75 (Spinks); *The City of London*, 1 Swab. 245.

(*t*) *The Egyptian*, 1 Moo. P. C. N. S. 373.

(*u*) *The Virgil*, 2 W. Rob. 205; *The Marpesia*, L. R. 4 P. O. 212; *The Thornely*, 7 Jur. 659; *The Shannon*, 2 W. Rob. 463.

(*x*) *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Ex. 208; *Austin v. New J. Steam Co.*, 43 N. Y. 75.

a reasonable man exercising skill would do, he is not answerable merely because, judging after the event, he is seen to have omitted some possible precaution (*y*). But where the circumstances, such as the weather or the navigation are of an extraordinary character, extraordinary care must be taken in order to exonerate the vessel doing damage (*z*).

At common law the pilot is the agent of the owner, who is responsible for his acts (*a*).

Owners or masters of vessels are protected by the Merchant Shipping Act from loss arising from the default of a qualified pilot, where the employment of a pilot is compulsory (*b*); the master must, however, keep a good look out (*c*); and he is responsible for negligence in respect of those matters which the pilot cannot control, such as the soundness of the ship, &c. (*d*). The burden of proof has been said to be upon the owner of the ship wishing to bring himself within the Act (*e*); and he must show that the pilot was to blame (*f*). It does not seem, however, that he must prove that he was not himself negligent, but the plaintiff must give affirmative evidence of the defendant's negligence before he can recover (*g*).

As to what duties appertain to the master and what to the pilot the reader may be referred to the cases in the note (*h*).

(*y*) *Doward v. Lindsay*, L. R. 5 P. C. 338.

(*z*) *The Itinerant*, 2 W. Rob. 236; *The Girolamo*, 3 Hagg. 169; *The Virgil*, *supra*; *The Perth*, 3 Hagg. 414; *The Ligo*, 2 Hagg. 356; *The Northampton*, 1 Ecc. & Ad. 152 (Spinks).

(*a*) *The Neptune the Second*, 1 Dods. 467; *The Eden*, 2 W. Rob. 442.

(*b*) S. 388 of Merchant Shipping Act, 17 & 18 Vict. c. 104. This applies to a British ship in foreign waters, see *The Halley*, L. R. 2 P. C. 193.

(*c*) *The Diana*, 1 W. Rob. Ad. 131; *Stuart v. Isemonger*, 4 Moo. P. C. 11.

(*d*) *The Iona*, L. R. 1 P. C. 426; *The Velasquez*, *ib.* 496; *The Calabar*, L. R. 2 P. C. 238; *Hammond v. Rogers*, 7 Moo. P. C. 160.

(*e*) *The Protector*, 1 W. Rob. Ad. 45; *Pollok v. McAlpin*, 7 Moo. P. C. 427, 430.

(*f*) *The Mobile*, 1 Swab. 127; *Pollok v. McAlpin*, 7 Moo. P. C. 427.

(*g*) *Clyde Nav. Co. v. Barclay*, 36 L. J. Ad. 18; L. R. 1 P. C. 494; *The Daioz*, 47 L. J. Ad. 1; 3 Asp. Mar. Law Cas. 477.

(*h*) *The Energy*, L. R. 3 A. & E. 48; 39 L. J. Ad. 25; *Marshall v. Moran*, L. R. 3 P. C. 205; *The Lochlibo*, 7 Moo. P. C. 430; 3 W. Rob.

If the employment of the pilot be voluntary the ship-owner is liable (*i*); but if it was compulsory just before the accident and had not fairly ceased, the ship-owner is excused if the accident occurred through such pilot's negligence (*k*).

Compulsory pilotage only applies to certain districts (*l*), and certain ships are exempted (*m*), the owners of which are responsible, though they have a duly qualified pilot on board (*n*).

The law presumes the pilot to have skill and experience, and assumes that he will exercise the greatest care, and thereupon it bestows upon him the largest possible power and authority (*o*).

As to the duties and liabilities of pilots, see the 17 & 18 Vict. c. 104, ss. 365, 373.

When the master of a ship enters into an agreement with the master of a tug to have his vessel towed to a particular place there is no warranty that this will be done. The tug only agrees to exercise diligence, care, and skill, and is not answerable for inevitable accident or *vis major* (*p*). It seems that as against strangers the tug is (so to say) the agent of the ship, and the latter is liable for its negligence. It also seems that the master of the ship is bound to obey the orders from the tug (as in the case of a pilot), unless they

Ad. 310, 321; *Hammond v. Rogers*, 7 Moo. P. C. 160, 171; *The Christiana*, *ib.* 171; *The Diana*, Greig. 1 W. Rob. Ad. 131; *The Portsmouth*, 6 Ch. Rob. Ad. 317, n.; *The Admiral Boxer*, 1 Swab. Ad. 193; *The Maria*, 1 W. Rob. Ad. 95, 110; *The Agricola*, 2 W. Rob. Ad. 10; *The Gipsy King*, 2 W. Rob. Ad. 537, 547; *The Julia*, Lush. Ad. 224, 233.

(*i*) *The Lion*, L. R. 2 A. & E. 102; 2 P. C. 525.

(*k*) *Gen. Steam Nav. Co. v. British and Col. Do.*, L. R. 3 Ex. 330; 38 L. J. Ex. 97; *The Woburn Abbey*, 38 L. J. Ad. 51.

(*l*) See the 17 & 18 Vict. c. 104, ss. 332, 340, 354, 353, 355, 370, 376. See Pritchard's Adm. Digest, tit. Owners, p. 429, 2nd ed.

(*m*) *Ib.*, s. 379; 25 & 26 Vict. c. 63, s. 41.

(*n*) *The Stettin*, 31 L. J. Ad. 208.

(*o*) *The Maria*, 1 W. Rob. 95, 110; *The Lochlibo*, 3 W. Rob. Ad. 310, 321; *The Portsmouth*, 6 C. Rob. Ad. 317, n.; *The Duke of Sussex*, 1 W. Rob. Ad. 270, 273.

(*p*) *The Minehaha*, 30 L. J. Ad. 211; *The Galatea*, Swab. Ad. 349.

are such as he is justified in refusing (*q*). The tug is under the command of a pilot on the ship (*r*). The presence of the pilot will not excuse the master of a ship who orders a vessel to be moored by a tug in a dock at night time (*s*). Where a steam-tug negligently comes into collision with a vessel, the owners of the tug are liable, although a compulsory pilot of the ship in tow caused the collision (*t*). A vessel in tow must exercise proper care, and if it does not it cannot recover against the tug in case of damages arising from the action of the tug (*u*). In an action of damage between two vessels, the Court has jurisdiction under Order XVI. to determine whether the defendant's vessel is entitled to indemnity from her tug (*x*).

The liability of owners of ships and owners of shares in ships to damages is regulated by the Merchant Shipping Acts, and it is not proposed in this book to enter into that question; but a few observations on the general law of damages in cases of collision may be offered.

In common law courts the action for damages is personal, but in the Admiralty courts it may either be personal or *in rem*—that is to say, the ship itself is liable for the damages.

The measure of damages is, as a rule, the amount of damage done (*y*) and no more (*z*); but where a smack was rendering salvage services at the time of the collision, it was held that the value of such services, if completed, might be recovered as well as the damage to the smack (*a*).

So the freight of a vessel hired in substitution of a disabled smack was held recoverable (*b*) as consequential damage. And

(*q*) See MacLachlan on Shipping, pp. 274, 275, 2nd ed., citing *The Energy*, L. R. 3 Ad. 48.

(*r*) See *The Christiana*, 3 W. Rob. Ad. 27; *Petty v. Cato*, 6 Moo. P. C. 371. See *The Energy*, *supra*.

(*s*) *The Borussia*, Swab. 94.

(*t*) *The Mary*, L. R. 5 P. D. 15.

(*u*) *Smith v. St. Lawrence Tow. Boat Co.*, L. R. 5 P. C. 308, 2 Asp. Mar. Law Cas. 41. See also *The*

Julia, Lush. 224, *The American and The Syria*, L. R. 6 P. C. 127.

(*x*) *The Cartburn*, L. R. 5 P. D. 35.

(*y*) *The Gazelle*, 2 W. Rob. 279; *The Clarence*, 3 W. Rob. 283; *The Mellona*, *ib.* 7.

(*z*) *The Columbus*, 3 W. Rob. 158.

(*a*) *The Betsy Caines*, 2 Hagg. 28.

(*b*) *The Yorkshireman*, 2 Hagg. 30, n.

if the plaintiff proves that his vessel would have earned freight in fact, and that the collision in fact deprived him of the freight, he may recover such freight (*c*).

So also where a barque was run into as she was proceeding to her port of loading, and through her delay the charterers had a right to cancel the charter-party, and she earned less freight in consequence, it was held she might recover damages for the loss of the charter-party (*d*).

The damages, however, must not be too remote (*e*), and though the plaintiff may recover for the immediate consequences of a collision, yet he cannot recover for such part of the loss as is occasioned by his own want of skill in attempting to save his ship (*f*).

In an action for damages by collision the defendant cannot reduce the amount by showing that the plaintiff has recovered a sum of money from the insurers (*g*).

(*c*) *The Clarence*, *supra*.

(*d*) *The Star of India*, L. R. 1 P. D. 466.

(*e*) *5 Eolides*, 3 Hagg. 367.

(*f*) *The Flying Fish*, 34 L. J. Ad. 113, P. C.

(*g*) *Yates v. Whyte*, 4 Bing. N. C. 272; *Althorf v. Wolfe*, 22 N. Y. 355; *Bradburne v. G. W. Ry. Co.*, 44 L. J. Ex. 9. See *post*, Ch. 8, Damages, p. 176.

CHAPTER IV.

NEGLECT OF DUTIES REQUIRING LESS THAN ORDINARY CARE.

AMONGST ordinary duties requiring no particular skill or care *per se* (a), and requiring something less than ordinary care by reason of their being performed solely for the benefit of another, are those of—

(1.) Gratuitous depositors.

Thus, where bankers (b) accept their customers' property for safe custody gratuitously, they are not required to exercise, as it should seem, even ordinary care, for they are not in this case holding themselves out as persons of skill, as they are when they are dealing with their customers' balance, &c., and they are not receiving any benefit by the deposit.

(2.) Gratuitous loan—in the case of the bailor.

A duty is contracted towards the borrower not to conceal from him defects known to the lender which may make the loan perilous to him (c); but as the loan is for the benefit of the borrower, the lender is only answerable for gross negligence.

(3.) Gratuitously dedicating a way to the public.

Here the public adopting the road must take it as it is, although if the dedicator omitted to warn the public of a danger known to himself he would be guilty of gross negligence (d).

(a) If the gratuitous duty be performed by a person professing particular skill, he will be liable for ordinary negligence at the least: see note (g) *ante*, p. 9.

(b) *Giblin v. M'Mullen*, L. R. 2 P. C. 817; 38 L. J. P. C. 25. See *ante*, p. 132.

(c) *Per Coleridge, J.*, *Blakemore v. Bristol & Exeter Ry. Co.*, 8 E. & B. 1035; *McCarthy v. Young*, 6 H. & N. 329; *Farrant v. Barnes*, 11 C. B. N. S. 553; 31 L. J. C. P. 137.

(d) *Robbins v. Jones*, 15 C. B. N. S. 221; *Fisher v. Prowse*, 2 B. & S. 770.

It seems that one who gratuitously acts as a solicitor is only liable for gross negligence; but it is safer to say that he is not responsible for so high a degree of care as if he were paid for his services (*e*).

So also a volunteer, though he is acting without any request, yet if he does so out of mere benevolence, and in order to avoid a probable loss to another, is only bound to show something less than ordinary care (*f*).

So also where a person allows another to come upon his premises, but solely for the benefit of such other person, it would appear from the cases that the inviter is not bound to show so much as ordinary care (*g*), although upon principle, as I have said, this is very doubtful. At all events, as regards a trespasser, he is only liable for gross negligence, and possibly not even for that, but only for such wanton mischief as amounts to wilful wrong (*h*).

Certainly where the defendant is doing a gratuitous service to the plaintiff he is only liable for gross negligence, as where the defendant drove the plaintiff gratuitously in his carriage (*i*). It was much argued in *Mills v. Holton* and others (*k*) whether the defendants were persons performing a gratuitous service or not, so as to render them only liable for gross negligence. The defendants (the landlords) sent men to repair the plaintiff's (the tenant's) well, neither party being bound to repair. The workmen negligently destroyed the well. The Court said it was a question for the jury whether the act was done gratuitously, or whether the defendants had undertaken to do the work properly. *Martin, B.*, said that if they had merely done an act of kindness he thought they would incur no responsibility. But if a volunteer undertakes any work he must, as we have said, exercise something more than ordinary care (*l*).

(*e*) See s. 11, *Solicitors, ante*, p. 128.

(*f*) See *Wharton on Negligence*, s. 534, and sect. 69.

(*g*) See *ante*, Ch. II. s. 2, p. 29.

(*h*) *Ante*, p. 31.

(*i*) *Moffat v. Bateman*, L. R. 3 P. C. 115.

(*k*) *Mills v. Holton*, 2 H. & N. 14.

(*l*) *Ante*, p. 73.

CHAPTER V.

CONTRIBUTORY NEGLIGENCE.

THE doctrine of contributory negligence is founded upon the maxim stated *ante* (a), "*In jure non remota causa sed proxima spectatur*," and "contributory negligence" in law is that sort of negligence which is the proximate and not the remote cause of the injury. Of course, in one sense every negligence which contributes at any time or in any degree is contributory negligence; but the phrase has acquired a technical or legal meaning, and in the legal sense is defined as above stated (b).

No doubt, in order that the above definition may be fully appreciated, the word "proximate" must not receive a narrow interpretation, as being limited merely to the time when the negligence occurred; nor must it be taken to mean merely that which was stated, *ante*, Ch. I., to be the meaning of "proximate cause," viz., such a cause as would probably lead to injury, and which has led to it.

The words "proximate cause" in the above definition must be taken to mean such a cause that its effect could not have

(a) Ch. I., p. 13, note (a).

(b) Thus in the "Donkey Case," *Davies v. Mann*, 10 M. & W. 546, *post*, p. 151, the plaintiff's act of tethering the donkey was more remote from the injury than the defendant's act of carelessly driving over him, and therefore the plaintiff could recover. So in

Radley v. L. & N. W. Ry. Co., *post*, p. 151, the piling of the truck by the plaintiffs was more remote from the injury to the bridge than the defendant's act of pushing the truck against it. And see *per Willes, J.*, in *Tuff v. Warman*, 2 C. B. N. S. 757, in Ex. Ch. 5 C. B. N. S. 573.

been counteracted or avoided by the ordinary care of the person alleging it. Thus, if the plaintiff could not by ordinary care avoid the effects of the defendant's negligence, the defendant's negligence is the proximate cause of the injury; and if the defendant could not by ordinary care avoid the plaintiff's negligence, the plaintiff's negligence is the proximate cause of the injury.

The above definition may therefore be expanded by saying that "contributory negligence" in law is that sort of negligence which, being a cause of the injury, is of such a character that the defendant could not avoid the effects of it.

When the plaintiff has proved, according to his evidence, that the act of the defendant has caused the injury of which he complains, the defendant in his turn may prove that the plaintiff, by his own act, contributed to cause the injury, and that the plaintiff might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. But such proof is not in itself sufficient to destroy the plaintiff's claim, and the defendant must go farther and show that the plaintiff's negligence was of such a character that the exercise of ordinary care upon the defendant's part would not have prevented the plaintiff's negligent act from causing the injury (c), and this is the sort of negligence which the law calls "contributory negligence."

Another and a different doctrine has sometimes prevailed, viz., that the plaintiff must be punished for his negligence by being left without remedy for his injury, and this though the defendant might with ordinary care have prevented it. But this seems to be very harsh and unjust towards the plaintiff. If the plaintiff's negligence is of a slight character, such that

(c) *Radley v. London and North-Western Railway Co.*, L. R. 1 App. Cas. 754; 46 L. J. 573 (pushing an overloaded truck against the top of a bridge); *Davies v. Mann*, 10 M. & W. 546 (donkey case); *Tuff v. Warman*, 5 C. B. N. S. 573 (steamer running down a barge); *Springett v. Ball*, 4

F. & F. 472 (foot passenger crossing, negligent, defendant's driver could have avoided). See a curious case of *Button v. Hudson River Co.*, 4 N.Y. 349, where defendant ran over a drunken man, when he might, by ordinary care, have avoided him.

it is in no sense the proximate or efficient cause of the injury, and the defendant can avoid its effects, it seems hard that the plaintiff's injury should remain unredressed ; if his negligence is of a grave character, it would probably be such that the defendant could not avoid its effects, and then the plaintiff would be unable to recover. Moreover, it is impossible to say how much negligence should disentitle the plaintiff to recover, and to say that any negligence, however trivial, should disentitle him, would be obviously unjust. But the rule as laid down in the text presents no such difficulty, for by it the plaintiff becomes disentitled to recover only where the defendant could not by ordinary care avoid the effects of the plaintiff's act which gives a practical test in each case of the kind and degree of negligence which should disentitle the plaintiff to recover.

It should seem that the same doctrine should be held to apply with respect to the negligence of *third parties*. It may be difficult in the particular case before the Court to determine what is the proximate cause of the damage ; but it is a difficulty which it is the duty of the Court to solve as well as it can, and if it arrives at a wrong conclusion, still no *injustice* is done ; but, upon the other hand, to adopt the doctrine that the negligence of third parties is no excuse, would be, in some cases, to do manifest *injustice*. Where the substantial and proximate cause of the injury is the act of a third party (an act the effects of which the defendant could not avoid), the defendant, it is submitted, ought to be excused. It might be that a very serious injury was almost entirely due to the third party, yet because such party is bankrupt the plaintiff has selected the defendant, who had very little to do with the injury, and could not avoid doing it, and has recovered heavy damages against him. It is true that Mr. Campbell, in his admirable sketch of the law of negligence, says that contributory negligence of a third party is no defence, and the same will be found in many text-books (see Shearman, para. 27 ; but see Wharton, para. 148—155 ; and see Addison on Torts,

5th ed., by L. W. Cave, Q.C., where the difficulty is mentioned); and the cases usually cited for that proposition are those which will be found, *ante*, pp. 13—16, Chapter I., but, as there stated, they appear, on examination, not to warrant such a conclusion. Indeed, they would seem to assume that the negligence of a third party would be an excuse if his act were the proximate cause of the injury, which in those cases was held not to be the fact. And, on the other hand, the cases of *Ayles v. South Eastern Railway Co.* (a), and *Daniel v. Metropolitan Railway Co.* (b), would seem to indicate that the negligence of a third party might afford an answer. It must be owned, however, that if the judgment in *Hughes v. Macfie*, and *Abbott v. Macfie* (c), cannot be otherwise explained, that case is an authority for saying that the negligence of a third party is no excuse. In that case, Hughes, an infant, had negligently pulled down the flap of a cellar, negligently left almost upright by the defendant. Judgment was given on a motion for a new trial, and it did not appear whether Abbott (another infant) who brought the second action, was jointly engaged with Hughes in the negligence. It was held that Hughes could not recover (probably because his act was the proximate cause), and that if Abbott was jointly engaged with him neither could Abbott recover; but that if he was not jointly engaged he could recover from the defendant, as the injury was the result of the joint negligence of the defendant and Hughes. Now if from the judgment in the first action it is to be inferred that Hughes' act was the proximate cause, we have here a judgment showing that the defendant would be liable, notwithstanding clear contributory negligence in a third person. But it may be doubted whether, in the first case the judgment proceeds upon the ground that Hughes' act was the proximate cause. It seems to have been rather on this ground that *quoad* Hughes, who was a volunteer, the

(a) *Ayles v. South Eastern Ry. Co.*,
L. R. 3 Ex. 146; 37 L. J. Ex. 104.

(b) *Daniel v. Metropolitan Ry. Co.*,

L. R. 5 Eng. & Ir. App. 45; 40
L. J. C. P. 121.

(c) *Hughes v. Macfie*, 2 H. & C. 744.

defendant had not been guilty of any negligence at all, but *quoad* innocent persons he had. Pollock, C.B., says that if Hughes had left the flap alone it would not have fallen, and that if the coat of some passer-by had caught it such passer-by might recover (or, in other words, that *quoad* some innocent party there was negligence in the defendant), and it would follow that if Hughes, the volunteer, and the defendant *quoad* Abbott (an innocent party) had been jointly guilty of a tort, each would be separately liable for the whole of the damages upon general principles (*d*).

It is well in considering the doctrine of "contributory negligence," to remember that after the plaintiff has shown that the defendant has been negligent, that then the defendant has to show—1st, that the plaintiff has been negligent in respect of the matter complained of, and might have avoided the consequence of the defendant's negligence; 2ndly, that his negligence has been of such a character that the defendant could not avoid its effects.

Now it is obvious that the defendant may often fail in proving the first proposition, just as a plaintiff may fail in proving the negligence of the defendant, and a great number of cases will be found in the books where the question of "contributory" negligence does not really arise although the term is used, but the real question is the one firstly above stated, viz., Has the plaintiff been negligent at all in respect of the matter complained of, and might he have avoided the defendant's negligence? Thus in those numerous cases already mentioned (*e*), where the defendant has invited the plaintiff upon his premises, or has in any other way misled the plaintiff into a feeling of security (*f*), the question has not really been whether the plaintiff has been guilty of "contributory negligence" or not, but whether under the circumstances he has been guilty of any negligence at all

(*d*) See *post*, Ch. VIII., Damages.

(*e*) *Ante*, pp. 80, 81.

(*f*) As in cases of invitation to

alight from a railway carriage, see *ante*, Ch. III. s. 7, Carriers, p. 121.

in respect of the injury. If in any of those cases it should be found that he had not been misled, then he would have been guilty of some sort of negligence, and the further question would thereupon have arisen, viz., whether he was guilty of "contributory negligence;" in other words, whether he had done a negligent act which was the proximate cause of the injury (*g*).

It may seem that there are some cases in which the 2nd proposition (*h*) can scarcely be said to be in issue. Where the defendant does an act the consequences of which are beyond his control, as if he leaves a cart in the street, and the horse runs away, and the plaintiff carelessly is driving on the wrong side of the way, it is obvious that the defendant cannot avoid the effects of the plaintiff's negligence in point of fact, but it is his own fault that he has disabled himself from doing so, and he must be held liable. If the defendant's negligence is of such a character that he has deprived himself of his power of avoiding the plaintiff's negligence, that is equivalent to his being able to avoid it and negligently omitting to do so. A case, which at first sight might be thought difficult to explain, might be thus interpreted: A, a station master, without looking at his table of trains, orders an up-train to be turned on the line C, and jumps into the train. B, another station master, at the same moment looks at his table of trains, but negligently looks at them and makes a mistake, and orders a down-train to be turned on the same line C. A is injured in the collision, and brings his action against B. The negligence of both parties is identical in point of time and

(*g*) Probably the case of *Smith v. St. Lawrence Towboat Co.*, L. R. 5 P. C. Ap. 308, may be explained to be within the above principle, although the inquiry was there never made whether the defendants could have avoided the plaintiff's negligence by the exercise of ordinary care, as it would seem they might. The plain-

tiff, the owner of the *Silver Cloud*, was being tugged by the defendant's tug. The *Silver Cloud* knew there was danger, but did not inform the tug. This may have led the tug into a feeling of security, and so there was no negligence on the part of the tug.

(*h*) *Supra*, p. 154.

both in an equally *substantial* manner have contributed ; but B, the defendant, has got to show that he could not by the exercise of care have avoided the plaintiff's (A's) negligence. He cannot show that, for the truth is that his act was of such a character as to render the plaintiff's negligence unavoidable. Suppose the defendant, sitting in his trap, negligently tied his reins to it, and fell asleep, and his horse started off ; the plaintiff negligently was playing at pitch and toss in the street ; the defendant, having awoke, could by ordinary care avoid running over the plaintiff, but he was too idle to untie the reins. The defendant is liable ; but, could it be contended that he would be less liable if he had deprived himself of the power of exercising care in the first instance by letting the reins lie upon the horse's back ? Clearly he would be liable, although as a matter of fact he could not avoid the plaintiff's negligence, having put it out of his power to do so.

The question whether the defendant could have avoided the consequences of the plaintiff's negligence was not put in the old cases, although perhaps substantially the doctrine operated upon the minds of the judges. Thus in *Butterfield v. Forrester* (*i*), the defendant placed a pole across part of a highway, the plaintiff might have seen it 100 yards off, but he was riding so violently in the streets of Derby that he rode against it, and was injured. The Court do not inquire whether the defendant could by ordinary care have avoided the plaintiff's negligence, but it is quite probable that he could not even if he had been there. A man riding as hard as he could in a public street, and not able to stop in 100 yards would probably have come to harm if defendant had done all that a man could do to warn him. So also, as was observed in *D. W. & W. Ry. Co. v. Slaterry* (*j*), if a man in broad daylight with nothing to obstruct his view chose to

(*i*) *Butterfield v. Forrester*, 11 East.
60.

(*j*) *D. W. & W. Ry. Co. v. Slaterry*,
L. R. 3 App. Cas. 1166.

cross a line in front of an advancing train, it would be his own folly, and the judge might nonsuit, and no doubt that is so, for his negligence would be of such a character that the defendant could not avoid it, for instance no whistling would be of any avail; but where, as in that case, it was at night, and the plaintiff was in a hurry to obtain a ticket, a whistle might have stopped him. It was a question for the jury which was the *causa causans*, the absence of whistling or the negligence of the plaintiff in not looking out.

It cannot be considered to be contributory negligence if the plaintiff has merely not anticipated the defendant's negligence (*k*), for the plaintiff has a right to presume that the defendant is going to act with ordinary care until he has some notice to the contrary, when it becomes his duty (as we have seen) to take ordinary means to avoid it, that is, such means as a prudent man ought to take. And by the same rule the defendant cannot presume the plaintiff's negligence, and provide against it before-hand, but when he is aware of it he is bound to use care to avoid it.

The defendant is not excused merely because the plaintiff knowing of a danger caused by the defendant voluntarily incurs that danger. The circumstances are for the jury. If the plaintiff negligently incurs such danger, that is to say, not acting as a reasonable man would do, he cannot recover (*l*). Nor is it any excuse for the defendant to say that the plaintiff is doing something illegal (*m*) unless

(*k*) *Vennal v. Garner*, 1 Cr. & M. 21 (ship relying on another taking a certain course). *Gee v. Met. Ry. Co.* L. R. 8 Q. B. 161; 42 L. J. Q. B. 105 (passenger relying on defendants having fastened the door). See *post*, Presumption of Care and Negligence, Ch. VI.

(*l*) *Clayards v. Dethick*, 12 Q. B. 439 (cabman leading horse past heap of soil). *Humphries v. Armstrong Co.*, 56 Pem. St. 204 (plaintiff crossing an unsafe bridge). *Jones v. Boyce*,

post, 176; *Adams v. L. & Y. Ry. Co.*, *ante*, p. 122.

(*m*) Either in case of breaking an Act of Parliament, see *Steele v. Buchart*, 104 Mass. 59; *Sutton v. Wanwantosa*, 29 Wisc. 21, but see *Feital v. Middlesex Ry. Co.*, 109 Mass. 398; see *Wharton*, ss. 331, 381, 405; or in case of breaking the common law, as by trespassing, see the cases of falling into an excavation on defendant's land, *ante*, Ch. II. s. 2, p. 31.

he can add that the doing so contributed materially to the accident.

The cases of *Clayards v. Dethick* (n) and of *Wyatt v. G. W. Ry. Co.* (o) have been commented on in the recent case of *Lax v. Darlington* (Mayor of), by Bramwell, L.J. (p), who objected to the phrase, "What would a prudent man do?" saying that a prudent man might lead a forlorn hope, or might jump out of a fast train, if he saw imminent danger to his wife or child; and in this sense the phrase does seem to be a bad one. The defendant cannot be expected to provide against, or to be answerable for, the effects of unusual and extraordinary motives which may tempt a man to incur danger. But the phrase must be taken to mean, "What would a prudent man do under ordinary circumstances?" Suppose an average prudent man (so to say) would endeavour to get out of a train just moving from Peterborough platform if he wanted to get out at Newark rather than be carried on to Retford. If so, there would be no contributory negligence; but suppose an average prudent man would not endeavour to get out if the train had been under weigh two minutes, therefore if any one did so, he would be guilty of contributory negligence; yet he might be a very prudent man *in fact* if £100,000 depended upon his stopping at Peterborough. It should be observed that in many cases, as in *Lax v. Darlington*, the defendant has done a wrong which has placed the plaintiff in a position where he has to choose between foregoing what he has a right to do or running a risk of injury, and the defendant, as a wrongdoer, does not seem to be in a position to take advantage of his own wrong (q).

It is not necessary in all cases that the question of contributory negligence should be left to the jury. If there is no evidence of it, it cannot be left to the jury any more than

(n) *Supra*.

(o) *Post*, p. 180.

(p) *Lax v. Darlington* (Mayor of),
L. R. 5 Ex. D. 28; 49 L. J. Ex. 105,

C. A.

(q) See an article in the *Solicitors' Journal* for February, 1880.

the defendant's negligence where there is no evidence of that (*n*). If the facts are clear and undisputed, and show that the plaintiff was guilty of contributory negligence, the judge may direct a nonsuit, because if that is clearly shown the plaintiff has failed to prove his case, which is that the damage is caused by the negligence of the defendants (*o*); and therefore the question of contributory negligence does not arise, but if there is a question of fact upon the issue of contributory negligence that must be left to the jury (*p*).

In some of the cases, the Court, in considering the question whether there was any evidence to go to the jury of the defendant's negligence, have inevitably been led to consider the conduct of the plaintiff; but it is obvious that the question of contributory negligence does not arise until the defendant's negligence has been proved, and therefore it must be remembered that the Court is only speaking of the plaintiff's conduct so far as it throws light upon the question whether the defendant has been shown to have been guilty of any negligence at all (*q*).

In proceedings for damages, where there has been negligence in both the parties to a collision between ships, the rule is to divide the loss between them (*r*); and in the American Courts it has been held that if the plaintiff's act has aggravated the extent of the damage, he can only recover what he has suffered from the defendant's act alone (*s*); but this has not been the rule in our Courts, but the defendant

(*n*) *Dublin, W. & W. Ry. Co., L. R. 3 App. Cas.*, see particularly judgment of Lord Penzance, at p. 1180; also *Jackson v. Met. Ry., ante*, p. 117.

(*o*) *Bridges v. North London Ry. Co., L. R. 6 Q. B. 377*, at page 394; and see *S. C. in L. R. 7 H. L. 213*, from which it seems that in general the safer course is to leave the question to the jury; see *Jackson v. Met. Ry., supra*; see also *Gee v. Met. Ry. Co., L. R. 8 Q. B. 171*, at p. 175; *Toomey v. L. B. & S. C. Ry. Co., 3 C. B. N. S. 146*.

(*p*) See *per Lord Penzance in D. W. & W. Ry. v. Slattery, supra*; see *Jackson v. Met. Ry., supra*.

(*q*) See judgment of Lord Penzance in *D. W. & W. Ry. Co., L. R. 3 App. Cas.* at p. 1177.

(*r*) See *Williams v. Bruce, Ad. Prac. 72*; and see *Judicature Act, 1873*, s. 25 (9); and see *ante*, s. 14, *Ships*.

(*s*) *Sherman v. Fall River Iron Co., 2 Allen, 524*; *Chase v. New York Central Ry. Co., 24 Barb. 273*; *Laurence v. Housatonic Ry. Co., 29 Conn. 390*.

has been held liable (if at all) for the whole damage (*t*), except where the effect of the plaintiff's negligence is separable from that of the defendant (*u*).

The cases where a servant has entered upon a particular employment with notice of its dangerous condition are somewhat peculiar, but it must be remembered that there is a contract, or mutual consent, on both sides to accept the existing state of things. The defendant is said to be guilty of negligence in keeping his premises or machinery in a dangerous state, and the plaintiff is guilty of negligence in accepting the service, or in his acts, as the case may be. Now, although the defendant might have prevented the damage by ordinary care, still he was not bound to do so by reason of the consent of the plaintiff to the existing state of things, and therefore the plaintiff's negligence becomes equivalent to "contributory negligence" (*x*). These cases are the converse of those above mentioned, where the defendant has, so to say, bound himself by his conduct to save the plaintiff harmless, for here the plaintiff by his conduct agrees to accept the danger, or to save the defendant harmless (*y*).

It is a matter of common sense that a person who is crossing a railway line upon a level should look before he crosses (*z*); but, possibly, if there were a statutory duty upon the railway to keep gates or guards, the defendants might mislead the plaintiff into a feeling of security, and his not looking when the gates were open, or unguarded, might not be evidence of negligence (*a*).

(*t*) *Greenland v. Chaplin*, 5 Ex. 243; and see *ante*, Ch. I., p. 13, as to rule relating to proximate damage.

(*u*) See the cases, *ante*, p. 13, Ch. I., Proximate Causes; and see *post*, Ch. VIII. Damages.

(*x*) *Senior v. Ward*, 1 Ell. & Ell. 385; *Caswell v. Worth*, 5 E. & B. 385. See *ante*, p. 56, Master and Servant.

(*y*) It is a question for the jury what amount of danger the plaintiff

undertook to incur, and the defendant is not excused for an amount of negligence beyond that; see *Clayards v. Dethick*, 12 Q. B. 439, *ante*, p. 156, note (*l*).

(*z*) *Stubley v. L. & N. W. Ry. Co.*, L. R. 1 Ex. 20; 35 L. J. Ex. 3; *Skelton v. L. & N. W. Ry. Co.*, L. R. 2 C. P. 681; 36 L. J. C. P. 249.

(*a*) *Stapley v. L. B. & S. C. Ry. Co.*, L. R. 1 Ex. 21; 35 L. J. Ex. 7; see *Skelton v. L. & N. W. Ry. Co.*, *supra*.

The case of *Wyatt v. Gt. W. Ry. Co.* (b) is a singular one. There was a statutory duty upon the defendants to erect gates, the plaintiff coming when there was nobody to open the gates opened them himself, and they closed upon him and injured him. The majority of the Court (Cockburn, C.J., Crompton and Shee, JJ.) held that the public right of way was obstructed by statute, and the plaintiff had no right to remove the obstruction; but Blackburn, J., dissenting in a very clear judgment, said that if the plaintiff had not contributed to the injury by any want of ordinary care, he could recover as he had a right to go along the road subject to the proper and legal obstruction by the defendants.

It has been decided several times, and must be taken as the law, that not only will the plaintiff be disentitled to recover, if he has been guilty of contributory negligence himself, but also if those with whom he is identified have been guilty of contributory negligence (c). The above rule has been disapproved of in Scotland (see *Campbell on Negligence*, 2nd ed., p. 185), and in America the rule is that the plaintiff is only defeated by showing that the person whose negligence is sought to be imputed to the plaintiff is under his direction, or that he controlled the plaintiff's personal conduct (see *Shearman on Negligence*, para. 46). Also, it should be remembered that the case of *Thorogood v. Bryan*, *supra*, has been disapproved of in *Tuff v. Warman*, *supra*, and in *The Milan* (d). It is also disputed in the note to *Ashby v. White* (e). But it seems to be settled law according to *Waite v. N. E. Ry. Co.*, *post*, and *Armstrong v. L. & Y. Ry. Co.*, *supra*; and to the same effect is the case of *Child v. Hearn* (f), although the Court

(b) *Wyatt v. Gt. W. Ry. Co.*, 6 B. & S. 709. Commented on in the recent case of *Lax v. Darlington*, *ante*, p. 157.

(c) *Thorogood v. Bryan*, 8 C. B. 115 (plaintiff, a passenger in an omnibus, identified with owner); *Cattlin v. Hills*, *ib.* (plaintiff passenger on a steamer); *Armstrong v. L. & Y. Ry. Co.*, L. R. 10 Ex. 47; 44 L. J., Ex. 89 (plaintiff, an inspector, travelling

in train by pass run into by train of another company).

(d) *The Milan*, 1 Lush. 388.

(e) *Ashby v. White*, 1 Sm. L. C. 6th ed. 266.

(f) *Child v. Hearn*, L. R. 9 Ex. 476; 43 L. J., Ex. 100 (plaintiff servant of railway company, who had neglected to fence, pigs of defendant got on line and upset plaintiff's trolley).

seemed anxious to distinguish the case from *Thorogood v. Bryan* by saying that the plaintiff was the servant of the railway company, whose fences were out of repair, and whose line he was using as such servant for the company's purposes when the defendant's pigs upset his trolley and injured him. The case of *Rigby v. Hewitt* (g) appears to be in favour of the counter-proposition, but the judgment is unsatisfactory. Two omnibuses were racing, and the point was taken upon the argument that the plaintiff was identified with the owner of the omnibus, and *Thorogood v. Bryan* was cited; but the judgment does not deal with that question, but seems to go upon the ground that the defendant's omnibus was the cause of the injury and not the plaintiff's.

The doctrine of contributory negligence is applied to children, and to those having the control of them (h).

In one case *Channell, B.*, at *nisi prius*, is reported to have said: "The doctrine of contributory negligence does not apply to an infant of tender age" (i).

This rule is scarcely satisfactory, because it is difficult to say what is or is not a tender age; but a better rule which would probably excuse the negligence of a child of tender age is that a child is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising.

In an American case where the child was six years old, and shook a gate which had been negligently hung, and which fell upon him, and the jury found that considering the

(g) *Rigby v. Hewitt*, 5 Ex. 240.

(h) *Singleton v. East. Count. Ry. Co.*, 7 C. B. N. S. 287; *Waite v. N. E. Ry. Co.*, F. B. & E. 719. In America this appears to be limited (in the case of persons having the control of infants) to their negligence in placing the infant in a position of danger, but not to their negligence in respect of their own particular acts, *Shearman*, p. 59, para. 48. In the following Scotch cases the plaintiffs were held

disentitled to sue for injury done to their children on the ground that it was contributory negligence in them to let their children go out alone. *Davidson v. Monkland Ry. Co.*, 27 Jur. 541; *Lumsden v. Russell*, 28 Jur. 181; *Balfour v. Baird*, 30 Jur. 124.

(i) *Gardner v. Grace*, 1 F. & F. 359 (child three and a-half years old run over by defendant), action brought in name of child.

age and circumstances there was no negligence in the child, the verdict was upheld (*k*). This is in truth nothing more than an illustration of the ordinary rule that what is negligence in any particular person depends upon all the circumstances of the case (*l*).

In *Lynch v. Nurdin* (*m*), the defendant had been guilty of negligence in leaving a cart unattended; but in *Hughes v. Macfie* (*n*), the cellar-flap would not have fallen if the child had let it alone. So in *Mangan v. Atterton* (*o*), the machine would not have gone round without the deliberate act of the children, but that case has been doubted in *Clark v. Chambers* (*p*), and it is said that the defendant was guilty of negligence in leaving the machine unguarded, which would bring the case within *Lynch v. Nurdin*.

(*k*) *Birge v. Gardiner*, 19 Conn. 507.

(*l*) See in *Lynch v. Nurdin*, 1 Q. B. 29 at p. 36 and at p. 38, 39, and *Lay v. Midland Ry. Co.*, 34 L. T. N. S. 30 (child seven years of age sliding along the railings of a bridge slipped through); *Hughes v. Macfie*, 2 H. & C. 744, seems, however, scarcely to recognise such an excuse, see *Coleman*

v. S. E. Ry. & H. & C. 699 (boy of twelve years of age).

(*m*) See *ante*, p. 16.

(*n*) See *ante*, p. 153.

(*o*) *Mangan v. Atterton*, L. R. 1 Ex. 239; 35 L. J. Ex. 161: see *ante*, p. 91.

(*p*) *Clark v. Chambers*, 47 L. J. Q. B. 427; L. R. 3 Q. B. D. 439, *ante*, p. 16.

CHAPTER VI.

PRESUMPTIONS OF CARE OR NEGLIGENCE.

Res ipsa loquitur.

THERE is a presumption in favour of all persons that they will exercise care in the performance of their duties. It is presumed in favour of the defendant; and, therefore, the plaintiff is in all cases bound to give evidence of negligence. It is also presumed in favour of the plaintiff, and if the defendant wishes to rebut that presumption he must give evidence of the plaintiff's negligence, and, in order to defeat the plaintiff's right of action, he must go further and show that the plaintiff's negligence was "contributory negligence" in law, see *ante*, Chapter V.

Persons have a right to proceed to the performance of their duties upon the presumption that others will exercise ordinary care in the performance of theirs, and unless they have some reasonable ground for supposing that others are not going to exercise care, or are engaged in something requiring additional precaution, they are not guilty of negligence in omitting to provide against such unforeseen danger (*a*).

We have seen, *ante*, p. 10, note (*u*), that in actions of negligence (as indeed in all actions) the plaintiff must give some proof of his case beyond a mere scintilla of evidence, and if he

(a) *Daniel v. Met. Ry. Co.*, L. R. 5 Eng. & Ir. App. 45.

does not, it is the duty of the judge to direct a non-suit (*b*). The question of what is sufficient evidence to go to the jury is one for the judge in the particular case before him; but there are a class of cases in which there has been no direct evidence of any particular act of negligence, beyond the mere fact that something unusual has happened, which has caused the injury; and upon the maxim, or rather phrase, "*res ipsa loquitur*," it has been held that there is evidence of negligence. As the phrase imports there must be something in the facts which speak for themselves, and therefore each case will depend upon its own facts, and it will be difficult to lay down any guiding principles. It may, perhaps, be safely stated that where a certain course of action has been pursued by any person without injury to others, and he, upon changing that course, injures another, the thing (unexplained) speaks for itself that such person has been negligent (*c*); or if something unusual happens with respect to the defendant's property, or something over which he has the control which injures the plaintiff, and the natural inference on the evidence is that the unusual occurrence is owing to the defendant's act, the occurrence being unusual is said (in the absence of explanation) to speak for itself (*d*), that such act was negligent.

(*b*) Ch. I., p. 10, note (*u*).

(*c*) *Kearney v. L. B. & S. C. Ry.*, L. R. 6 Q. B. 759; 40 L. J. Q. B. 285; *Byrne v. Boadle*, 2 H. & C. 722; 33 L. J. Ex. 13; *Scott v. London Dock Co.*, 34 L. J. Ex. 17; 3 H. & C. 59; *per Piggott*, B. (bags of sugar falling from crane); *M'Mahon v. Davidson*, 12 Minn. 357 (bursting of a boiler on a steamer).

(*d*) *Briggs v. Oliver*, 35 L. J. Ex. 163 (packing case propped against wall); *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 17 (oil on vessel getting into cargo); *Moffat v. Bateman*, L. R. 3 P. C. 115 (bolt-pin of carriage giving way, plaintiff invited into defendant's carriage). It was observed in this case that there is

nothing unusual in a carriage accident *per se*, as there is in the falling of bags of sugar, as in *Scott v. London Dock*, *supra*; *Simson or Smith v. L. G. Omnibus Co.*, L. R. 8 C. P. 390; 42 L. J. C. P. 112 (omnibus horse kicking, unusual occurrence); *Mullen v. St. John*, 57 N. Y. 567 (fall of building into street); *Stokes v. Saltonstall*, 13 Peters, 181 (stage coach upset); and also *Christie v. Griggs*, 2 Camp. 79, *per Lord Mansfield*, *sed quære*, if a carriage accident is not unusual, why should a stage coach accident be so; and see *Templeman v. Haydon*, 12 C. B. 507; *Welsh v. Lawrance*, 2 Chit. 262; *Doyle v. Wragg*, 1 F. & F. 7. A collision between two trains under the control

Where, upon the other hand, something unusual occurs which injures the plaintiff, but such unusual occurrence is not even inferentially the result of any unusual act of the defendant, and the defendant has, so far as he is concerned, been pursuing his usual course which has heretofore been done in safety, then the unusual occurrence is what is called an accident, or is perhaps the fault of the plaintiff himself (*e*). Care should be taken here to distinguish those cases where an accident happens through the neglect of the defendant, although things are allowed to go on in their usual course in one sense, that is to say, they are left to get out of order by neglect, but this is in truth a distinct act of negligence in omitting to examine and repair, and the accident is caused by an unusual circumstance induced by the act of the defendant. Such a case is that of *Webb v. Rennie*, 4 F. & F. 608, and probably some of the cases in the note, *supra*, as to carriage accidents are explainable on this ground.

It is clear that the cause of the accident must be connected with the defendant either by direct evidence of its being his act, or that it is under his control, before it can be presumed that he has been negligent (*f*). It also seems clear that the phrase cannot apply to cases where it is open to doubt whether the plaintiff has not neglected some duty devolving upon him (*g*).

of the same company, *Skinner v. L. B. & S. C. Ry. Co.* 5 Exch. 787; *Carpue v. L. & B. Ry. Co.*, 5 Q. B. 751; running off the line, *Dawson v. M. S. & L. Ry. Co.*, 5 L. T. 682; *Bird v. G. N. Ry. Co.*, 28 L. J. Ex. 3; *Flannery v. W. & L. Ry. Co.*, 11 Ir. R. C. L. 30; are *prima facie* evidence of negligence. See also the cases, *ante*, Ch. III. s. 8, Carriers. So the giving way of any part of the line is *prima facie* evidence, and conclusive unless rebutted, *G. W. Ry. Co. of Canada v. Fawcett*, 1 Moo. P. C. N. S. 101.

(*e*) See the Railway Cases, *ante*, s. 8, Carriers; and see *Abbott v. Freeman*, 35 L. T. N. S. 783, reversing judgment of Exchequer, and see judgment of Pollock, B., in Court below, 34 L. T. N. S. 544.

(*f*) *Higgs v. Maynard*, 12 Jur. N. S. 705 (ladder in defendant's workshop broke a window; held that plaintiff must show that ladder was under defendant's control), and see *Welfare v. L. B. & S. C. Ry.*, L. R. 4 Q. B. 693, where Court would not presume that a man on a roof was in the employ of the owner. See this case, *post*, p. 167. In *Smith v. G. E. Ry. Co.*, L. R. 2 C. P. 10 (a dog not under the control of the defendants got upon the platform and bit the plaintiff); *Wright v. Midland Ry. Co.*, L. R. 8 Ex. 137; 42 L. J. Ex. 89 (driver of North Eastern train negligently disregarding Midland signals).

(*g*) This would appear from the case of *Cotton v. Wood*, 29 L. J. C. P. 333, where there were reciprocal

Where there is no duty upon the plaintiff, or where the duty which he has to perform has been performed by him, it is clear that the negligence of the plaintiff is out of the question; and, if the accident is connected with the defendant, the question of whether the phrase "*res ipsa loquitur*" applies or not, becomes a simple question of common sense.

A very good illustration upon this point is put by Willes, J., in giving judgment (*h*) in the case of *Czech v. The General Steam Navigation Co.*: "If a shipment of sugar took place under a bill of lading, such as the present one, and it was proved that the sugar was sound when put on board, and had become converted into syrup before the end of the voyage, if that was put as an abstract case I think the shipowner would not be liable, because there may have been storms which occasioned the injury, without any want of care on the part of the captain or crew; the injury alone, therefore, would be no evidence of negligence on their part. But if it was proved that the sugar was damaged by fresh water, then there would be a strong probability that the hatches had been negligently left open, and the rain had so come in and done the injury, and, though it would be possible that some one had wilfully poured fresh water down into the hold, this would be so improbable that a jury would be justified in finding that the injury had been occasioned by negligence in the management of the ship" (*i*).

The mere fact of a man driving on the wrong side of the road is, it seems, no evidence of negligence in his having run over a foot passenger (*k*), but probably driving on the wrong side is *prima facie* evidence in case of collision with another

duties upon the foot passenger to look out for vehicles and for drivers to look out for foot passengers. See *Hammack v. White*, 11 C. B. N. S. 588; 31 L. J. C. P. 129.

(*h*) *Czech v. General Steam Navigation Company*, L. R. 3 C. P. 18; 37 L. J. C. P. 3.

(*i*) See also *per Cockburn, C.J.*, in

Kearney v. L. B. & S. C. Ry., *supra*, where he suggests it is possible but not probable that the brick might have fallen out of the railway arch through change of temperature.

(*k*) *Lloyd v. Ogleby*, 5 C. B. N. S. 667. The case scarcely seems to decide this satisfactorily. See also *Chaplin v. Hawes*, 3 C. & P. 554.

vehicle; and the reason is that in the latter case the other vehicle is on its *right* side, which seems to negative any negligence on the part of its driver, whereas in the case of the foot passenger there is nothing to show whether he was negligent or not (*l*).

Of course when the circumstances are explained the rule does not apply; so that where the injury arises from circumstances over which the defendant has no control, and he has exercised a proper amount of care but to no effect, he is not liable in an action of negligence (*m*).

The mere fact of an accident is not, however, evidence of negligence (*n*).

"Where a person desires to have the roof of a building repaired he employs some one not only to repair the roof but to see to its condition; and if he employs a competent person, the business of that person upon proceeding to repair the roof is to look at its condition, and to see how far it will support him or his workmen in doing the necessary work" (*o*). And therefore, in the absence of any evidence to show that the defendants knew of the insecurity of the roof, it was held that the mere fact of a plank and roll of zinc falling through a roof while a man was on the roof was no evidence of negligence against the defendants (*p*). The thing did not speak for itself, first, because there probably was some doubt as to whether it was the defendant's (or his servant's) act at all; and next, because it could not be shown that the defendant

(*l*) We have seen, *ante*, p. 23, that a man driving on the wrong side is bound to use more than ordinary care.

(*m*) *Hammack v. White*, 11 C. B. N. S. 588; 31 L. J. C. P. 129 (man on horse on footpath shown to have done his best to keep off); *Latch v. Rumner Ry. Co.*, 27 L. J. Ex. 155 (train off line; act of stranger); *Wakeman v. Robinson*, 1 Bing. 213 (defendant's horse in gig frightened by butcher's cart); *Gibbons v. Pepper*, 1 Ld. Raym. 38

(horse frightened by thunder); *North v. Smith*, 10 C. B. N. S. 575 (*contra*, if spur be used).

(*n*) *Hammack v. White*, 11 C. B. N. S. 676; *Bird v. Gt. Northern Ry.*, 28 L. J. Ex. 3; *Welfare v. Brighton Ry. Co.*, L. R. 4 Q. B. 698 (roll of zinc fell through a roof); *Smith v. G. E. Ry. Co.*, *ante*.

(*o*) *Per Cockburn, C.J.*

(*p*) *Welfare v. The L. B. & S. Ry. Co.*, L. R. 4 Q. B. 693; 38 L. J. Q. B. 241.

was negligent unless knowledge of the insecurity of the premises was shown. The Court also said that they could not presume that the man on the roof was in the employ of the owner, as he might be in the employ of a contractor (q).

(q) In America it has been held that the falling of a piece of wood from a building during repairs is *prima facie* evidence of negligence in the owner. *Clare v. National City*

Bank, 1 Sweeny, 539. And so also that drivers of carriages are in the service of the owners: *Norris v. Kohler* 41 N. Y. 42.

CHAPTER VII.

LORD CAMPBELL'S ACT.

At Common Law a civil action would not lie for an injury causing death (*a*), but a remedy has in certain cases been provided by a statute passed in 1846, and commonly called Lord Campbell's Act (*b*), which, after reciting that—whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him, by section 1 it is enacted that “whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as would amount in law to felony.”

By section 2, “every such action shall be for the benefit of the wife, husband, parent, and child (*c*) of the person whose death shall have been so caused, and shall be brought by and

(*a*) *Baker v. Bolton*, 1 Camp. 493.

(*b*) 9 & 10 Vict. c. 93.

(*c*) An illegitimate child is not

within the statute: *Dickenson v. N. E. Ry. Co.*, 2 H. & C. 735; 33 L. J. Ex. 91.

in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct" (*d*).

By section 3, "Provided always that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person."

By section 4, "In every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

By section 5, "The following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word 'person' shall apply to bodies politic and corporate; and the word 'parent' shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word 'child' shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter."

By section 6 the Act is not to apply to Scotland.

(*d*) See 27 & 28 Vict. c. 95, ss. 1, 2; and also 31 & 32 Vict. c. 119, s. 25.

The doctrine of contributory negligence applies (e) to actions under Lord Campbell's Act.

A mother having a legal claim for support from her son, who is actually supporting her at the time, may bring an action under the statute for the loss of such support, and, it seems, even if the claim for support were a mere moral claim (f).

If the party injured receive compensation in satisfaction of all claims before his death, an action will not lie after his death, for his death does not create a fresh cause of action (g).

The jury cannot take into consideration mental suffering or loss of society (h).

Damages of a pecuniary nature must be shown (i), and they must not be of a merely nominal character (k).

It is not necessary, however, to show the loss of a legal right, a loss of reasonable expectation of benefit being sufficient to support the action (l).

Expenses of funeral and mourning are not recoverable (m).

It was held in one case that damages are not to be estimated according to the value of the deceased's life calculated by annuity tables, but the jury are to give a fair compensation (n); but it has been decided that where the deceased had covenanted to pay an annuity to the plaintiff, the tables might be consulted to show the value of his loss (o). In the

(e) *Senior v. Ward*, 1 El. & El. 385; 28 L. J. Q. B. 139; *Wigmore v. Jay*, 5 Exch. 354; *Tucker v. Chaplin*, 2 C. & K. 730.

(f) *Weems v. Mathieson*, 4 Macq. H. L. Cas. 215.

(g) *Read v. G. Eastern Ry. Co.*, L. R. 3 Q. B. 555; 9 B. & S. 714; 37 L. J. Q. B. 278.

(h) *Blake v. Mid. Ry. Co.*, 18 Q. B. 93. In Scotland they may. *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748.

(i) *Franklin v. S. E. Ry. Co.*, 3 H. & N. 211.

(k) *Boulter v. Webster*, 13 W. R. 289; 11 L. T. N. S. 598; *Duckworth*

v. Johnson, 4 H. & N. 653; 29 L. J. Ex. 25. Nominal damages may be recovered in America. *Shearman*, s. 299.

(l) *Franklin v. S. E. Ry.*, *supra*; *Dalton v. S. E. Ry. Co.*, 4 C. B. N. S. 296; 27 L. J. C. P. 227; *Pym v. Gt. Northern Ry. Co.* *infra*.

(m) *Dalton v. S. E. Ry. Co.*, *supra*. See, however, *Osborne v. Gillett*, *post*, p. 173.

(n) *Armstrong v. S. E. Ry. Co.*, 11 Jur. 758; and see the judgment of Brett, J., in *Rowley v. L. & N. W. Ry. Co.*, *infra*.

(o) *Rowley v. L. & N. W. Ry. Co.*, 42 L. J. Exch. 153; L. R. 8 Exch. 221.

latter case the deceased was bound by his covenant, but in the former case the deceased might have varied the disposal of his income. It seems equally objectionable to allow the jury to suppose that they are bound by the tables or to prevent them from availing themselves of the assistance of the tables.

The deceased may have been in possession of a fixed income, so that if he had lived his injuries would not diminish his income, but the loss, though arising from the injuries, is practically suffered from the fact of the death causing the fixed income to be distributed, in such case the reasonable expectations of the persons entitled under the Act, and whose interests have been injuriously affected by the death, have to be considered, and even the loss of means of education and of the comforts and conveniences of life (*p*).

A wife received an injury on a railway to the pecuniary loss of her husband. On his death she sued the company to recover as testatrix for such loss. Held that the action being on the contract to carry safely, and the loss having accrued to the personal estate, the action survives to her (*q*). And so it was held that an executrix might recover for loss sustained by her husband being injured and unable to attend to business till his death (*r*).

As to distribution of damages between widow and children, see *Sanderson v. Sanderson* (*s*); *Shallow v. Verden* (*t*).

It seems that a judgment recovered for damages for injuries causing death is no bar to an action for injuries to deceased's personal property arising from the same negligence (*u*); and it is presumed the converse would hold good.

It is no answer to an action under this statute that the act

(*p*) *Pym v. Gt. Northern Ry. Co.*,
4 B. & S. 396; 32 L. J. Q. B. 377.

(*q*) *Potter v. Met. Ry. Co.*, 32 L. T.
N. S. 36 (Ex. Ch.).

(*r*) *Bradshaw v. Lanc. and York.
Ry. Co.*, L. R. 10 C. P. 189; 44 L. J.
C. P. 148.

(*s*) *Sanderson v. Sanderson*, 36 L. T.
N. S. 847.

(*t*) *Shallow v. Verden*, 9 Ir. R.
C. L. 150.

(*u*) *Barnett v. Lucas*, 6 Ir. R. C. L.
247.

causing the injury was a felony which has not been prosecuted (x).

The plaintiff's daughter was killed by the defendant's negligence, and he claimed damages for the loss of her services and for burial expenses; the defendant pleaded that the daughter was killed on the spot. It was held by the Court (Kelly, C.B., and Piggott, B., Bramwell, B., dissenting) that the plea was a good answer, on the ground that the case of master and servant did not come within the statute, and that apart from the statute no action lay (y). This judgment does not seem to be altogether satisfactory. It seems to be the law that a master cannot recover for loss of services where the servant is killed, but only where he is disabled; and, therefore, so far as the claim to damages for loss of service it would seem (notwithstanding the powerful reasoning of Bramwell, B., and the admission of Piggott, B., that the distinction is "shadowy") that the law is that the master cannot recover. But in the above case there was also a claim for burial expenses, and the plaintiff claimed for expenses for burying his daughter (not as his servant), and it does not clearly appear why the Court (not apparently upon the authority of *Dalton v. S. E. Ry.*, *supra*, p. 171, as that case was not cited, but upon the ground that the death was instantaneous) held he could not recover. The attention of the Court was not called to two American cases, viz., *Murphy v. New Haven Co.* (z), and *Whitford v. Panama R. Co.* (a), where it has been pointed out that death is not absolutely instantaneous with the injury, and there must be a moment of time in which the deceased had a right of action which (by the statute) survives to the representative. In Massachusetts and Maine the Courts have held that there is no right to sue for an injury causing instant death; but in

(x) *Osborne v. Gillett*, L. R. 8 Exch. 88; 42 L. J. Ex. 53.

(y) *Osborne v. Gillett*, 42 L. J. Ex. 53; L. R. 8 Exch. 88.

(z) *Murphy v. New Haven Co.*, 30 Conn. 184.

(a) *Whitford v. Panama Ry. Co.*, 23 N. Y. 486.

Connecticut and other States, as we have seen, the contrary has been held, and Messrs. Shearman and Redfield incline to the latter opinion. In the case of injury done to a servant, the master sues for the wrong done to himself, but in the case of a representative under Lord Campbell's Act the plaintiff is suing for the injury done to the deceased and thereby causing loss to others.

The damages must arise from the loss of a benefit derived from the relationship between the deceased and of the parties claiming compensation, not from a contract made between him and them (*b*).

On the other hand, in reduction of damages, the benefit arising from a life insurance or insurance against accidents may be taken into account (*c*).

(*b*) *Sykes v. N. E. Ry. Co.*, 44 L. J. B. & S. 403, note to *Pym v. G. N. Ry. Co.*, and see *Bradburn v. G. W. Ry. Co.*, L. R. 10 Ex. 1.
C. P. 191.
(*c*) *Hicks v. Newport Ry. Co.*, 4

CHAPTER VIII.

DAMAGES.

"It is not to be expected," said Mr. Justice Creswell, "that a jury [in a case of tort] will measure their verdict so nicely as in cases of contract" (*a*), and no doubt this applies to cases of negligence, and receives a constant illustration in the verdicts given by juries in actions arising out of railway accidents.

In some cases the amount of damages will depend upon the character of the negligence, as for instance if it be of a reckless character (*b*). And upon the other hand it should seem that the conduct of the plaintiff (not amounting to contributory negligence so as to be an answer to the action), may be given in evidence in mitigation of damages (*c*).

It is said that exemplary damages will not be allowed against a master for the negligence of his servants, however gross, if he is personally free from fault, and has maintained personal supervision over them (*d*), but if a man employs a notoriously drunken driver (*e*) he is answerable for his negligence.

(*a*) *Williams v. Currie*, 1 O. B. 848; *Huckle v. Money*, 2 Wils. 205.

(*b*) *Emblen v. Myers*, 6 H. & N. 54; 30 L. J. Ex. 71; *Bell v. Midland Ry. Co.*, 10 C. B. N. S. 287; 30 L. J. C. P. 273; *Wallace v. New York*, 2 Hilt. 440; *Heil v. Glanding*, 42 Penn. St. 493; *Thomas v. Harris*, 27 L. J. Ex. 353.

(*c*) *Arden v. Goodacre*, 11 C. B. 371; *Perkins v. Vaughan*, 7 Sc. N. R. 886; *Walton v. Christie*, 2 B. & P.

224; *Linford v. Lake*, 3 H. & N. 276; 27 L. J. Ex. 334; *Raisin v. Mitchell*, 9 C. & P. 613. So also the defendant may show that some of the injury done would have happened apart from his act, *Workman v. G. N. Ry. Co.*, 32 L. J. Q. B. 279.

(*d*) *Morford v. Woodworth*, 7 Ind. 83; *Shearman*, s. 601.

(*e*) *Frink v. Coe*, 4 Greene (Iowa) 555.

Recovery of insurance money cannot be set up in mitigation of damages for negligence (*f*).

Where the plaintiff sued the owner of an omnibus for personal injuries, but had accepted a sum of money from the driver awarded by a magistrate as compensation, it was held a good answer to the action, even though the sum was quite inadequate, and although the money was paid by the driver and not by the owner of the omnibus (*g*).

If a chattel be lost or destroyed through the negligence of the defendant the measure of the damages is the value of the chattel, but if the chattel be only injured then the depreciation in its value is the true measure, with an extra allowance for the loss of the use of the chattel while it is being repaired or replaced.

Thus in an action for injury to a horse the proper measure of damages is the keep of the horse, the farrier's bill, and the loss in the value of the horse (*h*), with some reasonable sum for any pecuniary loss of the use of the horse while under treatment (*i*), or for hiring another horse to do his duty (*k*).

We have seen *ante*, pp. 1, 13, that a man is not responsible for all the consequences which follow upon his negligent act, but only for those which might be reasonably expected to follow by a prudent man (*l*). So where a man jumped off a coach and broke his leg, the coach proprietor was held liable (*m*). But where the plaintiff tried to shut a railway carriage-door when the train was in motion, it was held that

(*f*) *Yates v. Whyte*, 4 Bing. N. C. 272; *Bradburne v. G. W. Ry. Co.*, 44 L. J. Ex. 9. The insurer is entitled to his share of the damages recovered, *Randall v. Cockran*, 1 Ves. Sen. 97; *Mason v. Sainsbury*, 3 Doug. 64; *Clark v. Blything*, 2 B. & C. 254. The benefit of an insurance to survivors may be set up under Lord Campbell's Act, see Ch. VII., p. 174.

(*g*) *Wright v. London General Omnibus Co.*, 46 L. J. Q. B. 493.

(*h*) *Hughes v. Quentin*, 8 C. & P. 703.

(*i*) *Watson v. Lisbon Bridge Co.*, 14 Maine 201; *Gillett v. Western Ry. Co.*, 8 Allen 560.

(*k*) *Johnson v. Holyoke*, 105 Mass. 80.

(*l*) *Greenland v. Chaplin*, 5 Exch. 248; *Cox v. Burbidge*, 13 C. B. N. S. 430; 32 L. J. C. P. 89.

(*m*) *Jones v. Boyce*, 1 Stark. 493.

the company were not liable for the consequences (*n*), and in general damages are not recoverable where they are too remote (*o*). But all damages which under ordinary circumstances might be expected to result are recoverable (*p*).

Where the negligence arises in the performance of a contract, the damages must be such as can reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it (*q*). So where the defendant was a collector of telegrams, and received one in cypher which was unintelligible to him from the plaintiffs, and he negligently omitted to send it, and so caused great loss to the plaintiffs, it was held that they could only recover nominal damages, because the defendant could not have contemplated any loss as he did not know what the telegram was about (*r*).

With respect to damages for personal injuries, the measure is loss of time, expense incurred, pain and suffering (*s*), and permanent injury causing pecuniary loss, as to which, it is said, that the amount awarded must not be an equivalent for the loss but some reasonable sum (*t*).

It is said that where it is impossible to estimate accurately the amount of damage done the defendant must suffer (*u*).

If some damage must have happened to the plaintiff, irrespective of the defendant's act, that must be deducted from the whole amount of damage done, for the defendant is only liable for the consequences of his own act (*x*).

(*n*) *Adams v. Lancashire & Yorkshire Ry. Co.*, L. R. 4 C. B. 739.

(*o*) See Ch. I., *ante*, p. 13.

(*p*) *Rigby v. Hewitt*, 5 Exch. 240; *Workman v. G. N. Ry. Co.*, 32 L. J. Q.B. 79; *Greenland v. Chaplin*, 5 Exch. 243.

(*q*) *Hadley v. Baxendale*, 23 L. J. Ex. 179; see the recent case of *Phillipps v. L. & S. W. Ry. Co.* (injuries to railway passenger), 49 L. J. C. A. 233; L. R. 5 Q. B. D. 78.

(*r*) *Sanders v. Stuart*, 45 L. J. C. P.

682.

(*s*) *Blake v. Midland Ry. Co.*, 18 Q. B. 93, at p. 111, but this does not apply to cases under Lord Campbell's Act. See the case, *supra*. For damages under that Act, see Ch. VI.

(*t*) *Armstrong v. S. E. Ry. Co.*, 11 Jur. 758; see *Phillipps v. L. & S. W. Ry. Co.*, *supra*.

(*u*) *Leeds v. Amherst*, 20 Beav. 239.

(*x*) *Workman v. Great Northern Ry. Co.*, 32 L. J. Q. B. 279; see *ante*, p. 158.

The plaintiff is entitled to such prospective damages as will to a reasonable certainty arise (*g*), and the same has been held in respect of injury to real property (*h*).

Where a plaintiff is disabled for life the measure of damages is not to be taken from the amount of an annuity which would replace the annual salary of the deceased, for it does not follow that he would have retained his situation for the whole of his life; but a reasonable sum must be given (*i*).

In the case of a railway accident, it was held that there was a contract to carry a man's wife safely, and that she being injured, and her husband sustaining by such breach of contract some pecuniary damage, his right of action survived to his executrix, who was the wife, and she could recover therefore for his loss by the injuries which she had sustained (*k*).

In cases of injuries to property, the measure of damages is the cost of reinstating the property, if the plaintiff as a reasonable man would have reinstated the property; but if not, then the depreciation in the value is the true measure (*l*).

For damages in carriers' cases, see Chapter III. s. 8, pp. 110, 113—116, "Carriers": and for damages under Lord Campbell's Act, see Chapter VII., pp. 169—174, "Lord Campbell's Act;" and in shipping cases, see Chapter III. s. 14, pp. 138, 140, 145.

Joint tortfeasors may in general be sued jointly or separately (*m*), so if the co-proprietors of a coach intrust the driving to one of their number all will be responsible for his negligence (*n*); and if two omnibuses are racing, and one of

(*g*) *Richardson v. Mellish*, 2 Bing. 240; *Ingram v. Lawson*, 8 Sc. 471; *Fetter v. Beal*, 1 Lord Raym. 339; *Goslin v. Cory*, 8 Sc. N. R. 21; *Gregory v. Williams*, 1 C. & K. 568.

(*h*) *Lamb v. Walker*, L. R. 3 Q. B. D. 389; *Backhouse v. Bonomi*, 9 H. L. C. 503.

(*i*) *Rapson v. Cubitt*, Car. & M. 64.

(*k*) *Potter v. Metropolitan Ry. Co.*, 32 L. T. N. S. 36 (Ex. Ch.)

(*l*) *Shearman*, s. 602; citing

McGuire v. Grant, 1 Dutch. 356; *Lukin v. Godsall*, Peake's Add. 15; *Houses v. Hammond*, 39 Barb. 89; *Terry v. New York*, 8 Bosw. 404; *Whitbeck v. N. Y. Central Ry. Co.*, 36 Barb. 644.

(*m*) Addison on Torts, 5th ed., by L. W. Cave, Q.C.

(*n*) *Moreton v. Hardern*, 4 B. & C. 223; but as to contribution, see *Pearson v. Skelton*, *infra*.

them runs over a man, he may recover against either proprietor (*o*).

So if several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform it, or for performing it negligently (*p*).

In trespass each tortfeasor is liable for the whole of the damages (*q*), and there can be no contribution; for if a plaintiff recovers judgment against two tortfeasors, and levies the whole damages upon one of them, he has no claim for a moiety from the other (*r*).

So also in negligence, if two persons are engaged in doing a negligent act they may be sued jointly, and they are jointly and separately liable for the whole of the damages (*s*).

It should be observed that the rule that one tortfeasor cannot recover contribution against another only applies where such tortfeasor knew that he was doing something illegal (*t*).

So where a coach was driven negligently by the servant of the proprietors, and a person whose horse was injured brought an action against one proprietor and recovered, and that proprietor brought an action against one of his co-proprietors, it was held that the first proprietor was only a tortfeasor by inference of law, and therefore could have recovered (*u*).

So also the rule does not apply where one person has employed another to do an act not unlawful in itself, and has indemnified him (*x*).

(*o*) *Thorogood v. Bryan*, 8 C. B. 121, per Cresswell, J., during argument, *supra*, p. 178.

(*p*) *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 251.

(*q*) *Hume v. Oldacre*, 1 Stark. 352.

(*r*) *Merreweather v. Nixan*, 8 T. R. 186.

(*s*) *Gray v. Pullen*, 5 B. & S. 970; *Steel v. Lester*, L. R. 3 C. P. D. 121;

47 L. J. C. P. 43.

(*t*) *Merreweather v. Nixan*, *supra*; *Adamson v. Jervis*, 4 Bing. 72; *Betts v. Gibbons*, 2 A. & E. 57.

(*u*) *Pearson v. Skelton*, 1 M. & W. 504. There was a non-suit, because being a partnership matter the remedy was in equity.

(*x*) *Merreweather v. Nixan*, *supra*.

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THE  
EMPLOYERS' LIABILITY ACT  
1880.

(43 & 44 VICT. c. 42).

WITH AN INTRODUCTION AND NOTES.

BY

HORACE SMITH, B.A.,

OF TRINITY HALL, CAMBRIDGE,  
AND OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW.  
AUTHOR OF "THE LAW OF LANDLORD AND TENANT," EDITOR  
OF "ROSCOE'S CRIMINAL EVIDENCE," ETC.

*(Forms a Supplement to Smith's "Treatise on the Law of Negligence.")*



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THE  
EMPLOYERS' LIABILITY ACT, 1880

(43 & 44 VICT. c. 42),

WITH AN INTRODUCTION AND NOTES.





## INTRODUCTION.

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I HAVE pointed out in my book on Negligence (p. 53) that in order to render a master liable to his servant for negligence there must be either *personal* negligence (a) or negligence by his representative or colleague.

The negligence of a fellow-servant is at Common Law taken to be one of those risks which the servant knew to be incident to the service, and which he therefore must be taken to have been willing to incur, pp. 56, 57 (b); but I also pointed out that no such undertaking is in fact made by any servant, and I ventured to suggest that there is no good reason why the ordinary rule should not prevail, viz., that masters should be held responsible for the negligence of their servants in all cases alike, except where the servant is acting out of the course of his employment, p. 58.

The law, however, said that a master was not responsible to his servant for the negligence of a fellow-servant in the common employment. Roughly speaking the negligence by which the servant as a matter of fact was a sufferer was generally that of his fellow-servant in the common employment, and the result was that the master was generally not liable. This state of things was intended to be remedied by the "Employers' Liability Act." The Act bears throughout the traces of the struggle through which it had to pass, and is a valuable but not

(a) This personal negligence may be either immediate or less direct, as by engaging incompetent servants, or by supplying defective materials. See

*Wilson v. Merry*, L. R. 1 S. & D. 326.

(b) *Bartonshill Coal Company v. Reid*, 3 Macq. 282.

altogether satisfactory compromise. The general scope is in favour of the workman or servant; but the limitations, which are many, are in favour of the master.

The present Act only applies to workmen, *i.e.*, to railway servants and to persons to whom the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), applies (see sect. 8, and the note thereon, *post*). There are, therefore, many servants to whom the Act does not apply in any manner, and there are a great many more who, although they may be "workmen" within the meaning of the Act, are not workmen to whom its special provisions apply.

(1) A master is liable for injury caused to such workman by any defect (sect. 1), arising from, or not discovered or remedied, owing to the negligence of the master, or of some person whose duty it was to see to such defect (sect. 2, subsect. 1)—*i.e.*, a master is liable for a *negligent defect*; which was probably the rule at Common Law (see pp. 50, 54, 59), see judgment of Lord Cairns in *Wilson v. Merry*, L. R. 1 S. & D. 308.

(2) A master is liable for any negligence of any person who has any superintendence *whilst in the exercise of such superintendence*.

This is a curious limitation upon the general rule that a master is liable for the negligence of his servant whilst in the course of his employment.

I do not quite know who a person who has superintendence is. He is defined in the Act to be a person whose sole or principal duty is that of superintendence; which reminds one very much of the definition of an archdeacon as being a person exercising archidiaconal functions. It is added that he is not "ordinarily engaged in manual labour," which does not seem to be very satisfactory.

(3) The master is liable for any negligence of any person to whose orders the servant was bound to conform and did conform, where such injury *resulted* from his having conformed to such orders.

I do not know what is the distinction between "caused by"

and "resulted from." If the section is read, "where such injury is caused by his conforming to such order," it seems somewhat useless; for not many injuries arise simply from conforming to an order. But of course in fact the injury would be caused by something beyond the mere conforming occurring whilst the workman was conforming to the order. If I tell a man to mount a ladder which has a broken step and he falls, the cause of the injury is not the mere conforming to my order, but it is the broken step. But the injury may be said to have "resulted" from the conforming, if "resulted" is taken to mean that the injury is caused by more than one force; that is, in fact by the resultant of several forces, of which the conforming is one. This gives the clause a wider scope, but I am unable to say which is the correct interpretation. The section at present says that a master is liable for an injury *caused* to a workman where the injury *results* from his having conformed to certain orders.

By these two last sections it is sought to make masters responsible for the negligence of head workmen.

In America it seems to be the law that, if the servant is so under the control of another servant that he is unable to take precautions against that servant's negligence, they are not fellow-servants, and the master is liable; see Smith on Negligence, p. 58, note (b); which seems to be a reasonable rule, but no such limitation was known to our law.

(4) A master is liable for any act or omission of any person made in obedience to bye-laws, &c., where the injury *resulted* from some defect, &c., in the bye-laws, &c. (Provido, a bye-law is not defective which has been approved.) That is to say, a master is liable for things done in pursuance of defective bye-laws, &c., which produce injury.

The word "result" is again used here as though it had a different meaning to "effect of one cause."

(5) A master is liable for the negligence of any person who has the control of any signal, points, locomotive engine, or *train* upon a railway.

This clause only applies to railways. What is a "train" is nowhere defined. A single truck cannot strictly be called a train, but whether several trucks unattached to an engine are a train will be a point which will have to be decided.

There is a further limitation of the master's liability contained in sub-section 3 of section 2, which, however, is no more than a statement of the Common Law. It is to the effect that where the workman knows of the cause and does not complain within a reasonable time, he cannot recover (unless he knows that no notice is necessary as the master knows of the cause already, which is of course the same thing as notice). That is to say, the workman has undertaken this particular risk of the service. Where a servant has informed a master of defects it becomes (see Smith on Negligence, p. 55) a question of evidence how far he and the master have agreed to a fresh service upon new terms. So if the master promises to repair the defect, if an accident happen while such promise is running, the servant may recover (p. 55). But if the servant after such a promise continues in the service, when such promise is evidently not intended to be performed, an adverse inference arises, viz., that he has undertaken the risk (p. 56).

The rest of the sections of the Act speak for themselves; but I do not know why a workman any more than any other person should be obliged to bring his action in the County Court (see sec. 6).

THE  
EMPLOYERS' LIABILITY ACT, 1880

(43 & 44 VICT. c. 42).

An Act to extend and regulate the Liability of  
Employers to make Compensation for Personal  
Injuries suffered by Workmen in their service.

By this Statute it is enacted as follows:—

1. Where after the commencement of this Act (*a*) personal injury is caused to a *workman* (*aa*)

Amend-  
ment of  
law.

(1.) By reason of any *defect* in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer (*b*); or

(2.) By reason of the *negligence* of any person in the service of the employer who *has any superintendence* (*c*) entrusted to him *whilst in the exercise of such superintendence*; or

(3.) By reason of the *negligence* of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, *where such injury resulted from his having so conformed* (*d*);  
or

(*a*) 1st January, 1881. See sect. 9, *post*.

(*aa*) A workman is, by sect. 8, *post*, defined to be a railway servant and any person to whom the Employers and Workmen Act, 1875, applies (see note to sect. 8).

(*b*) See p. 54 of Smith on Negligence, and see the remark in the introduction, *ante*.

(*c*) See the remarks in the introduction, *ante*, and see sect. 8, *post*.

(*d*) See the remarks in the introduction, *ante*.

(4.) By reason of the *act or omission* of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5.) By reason of the *negligence* of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train (e) upon a railway,

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Exceptions  
to amend-  
ment of  
law.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say,

(1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition (f).

(2.) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned, provided that where a rule or bye-law has been

(e) See the remarks in the introduction, *ante*. This clause is open to some objection. Suppose a person having the charge or control of a signal were engaged in doing something outside of his ordinary employment, would the master be liable whilst he was so

engaged? Suppose a man is shunting trucks with a horse and is not in charge of any signal, points or locomotive, is he a person in charge of a train?

(f) See the remarks in the introduction, *ante*.

approved or has been accepted as a proper rule or bye-law by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or bye-law.

- (3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence (g).

3. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

Limit of  
sum re-  
coverable  
as compen-  
sation.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death. Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

Limit of  
time for  
recovery of  
compensa-  
tion.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in

Money  
payable  
under pe-  
nalty to be  
deducted  
from com-  
pensation  
under Act.

(g) See the remarks in the introduction, *ante*.

respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action.

Trial of  
actions.

6.—(1.) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed (*h*).

(2.) Upon the trial of any such action in a county court before the judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3.) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such

(*h*) An action may be removed into the superior court in three ways: (1) by certiorari; (2) by order of the High Court under the "County Courts Equitable Jurisdiction Act," 28 & 29 Vict. c. 99, s. 3, and the County Court Rules, 1875, order xx. rule 7; or (3) by order of the county

court where it turns out that the amount is beyond the jurisdiction of the county court. See County Court Rules, 1875, order xx. rules 5 and 6. See this discussed in Mr. Pitt Lewis's County Court Practice, pp. 171-182.

actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts (i).

"County court" shall, with respect to Scotland, mean the "Sheriff's Court," and shall, with respect to Ireland, mean the "Civil Bill Court."

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877. 40 & 41  
Vict. c.50.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

7. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers. Mode of  
serving  
notice of  
injury.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

(i) For the manner in which rules and regulations, &c., are made in the county court, see Mr. Pitt Lewis's County Court Practice, p. 29, *et seq.*

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

**Definitions.** 8. For the purposes of this Act, unless the context otherwise requires,—

The expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour (k) :

The expression "employer" includes a body of persons corporate or unincorporate :

The expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies (l).

38 & 39  
Vict. c. 90.

(k) See the remarks in the introduction.

(l) 38 & 39 Vict. c. 90. This is an Act to enlarge the powers of county courts in respect of disputes between employers and workmen, and to give other courts a limited civil jurisdiction in respect of such disputes. It gives (s. 3) additional powers to the county court, allowing it (sub-s. 1) to adjust all claims liquidated, unliquidated for wages, damages or otherwise, to rescind (sub-s. 2) contracts, to accept (sub-s. 3) security for the performance of contracts. Power is also given (s. 4) to justices to order payment of wages, damages or otherwise, and to exercise all or any of the powers by this Act conferred upon a county court, except where the amount

claimed exceeds £10, &c., and to determine disputes between an apprentice and master, &c., ss. 5, 6, 7. Sections 8 and 9 refer to procedure.

By sect. 10: "In this Act the expression 'workman' does not include a domestic or menial servant, but save as aforesaid means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

9. This Act shall not come into operation until the first Com-  
day of January, one thousand eight hundred and eighty-one, <sup>mence-</sup>  
which date is in this Act referred to as the commencement <sup>ment of</sup> Act  
of this Act.

10. This Act may be cited as the Employers' Liability <sup>Short title.</sup>  
Act, 1880, and shall continue in force till the thirty-first day  
of December one thousand eight hundred and eighty-seven,  
and to the end of the then next Session of Parliament, and  
no longer, unless Parliament shall otherwise determine, and  
all actions commenced under this Act before that period  
shall be continued as if the said Act had not expired.



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